TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 660

MOLINE PROPERTIES, INC., PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 18, 1943.

CERTIORARI GRANTED MARCH 8, 1943.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 6, 1943.

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TRANSCRIPT OF RECORD

UNITED STATES CIRCUIT COURT OF APPEALS

FIFTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

MOLINE PROPERTIES, INC.,
Respondent.

ON PETITION TO REVIEW THE DECISION OF
THE UNITED STATES BOARD OF
TAX APPEALS

DOCKET NO. 103862

MOLINE PROPERTIES, INC., a Florida Corporation,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Appearances:

For Taxpayer: Douglas D. Felix,

B. M. Smethurst.

For Comm'r: F. L. Van Haaften.

DOCKET ENTRIES

1940

July 20—Petition received and filed. Taxpayer notified. Fee paid.

July 20—Copy of petition served on General Counsel.

July 20—Request for Circuit hearing in Miami, Florida, filed by taxpayer. 7/20/40 copy served.

Aug. 30—Answer filed by General Counsel.

Sept. 5—Copy of answer served on taxpayer. Miami, Florida.

Nov. 6—Hearing set Jan. 6, 1941, in Miami, Florida.

Dec. 26—Application for subpoena to Uly O. Thompson filed by General Counsel. (duces tecum.)

Dec. 26—Subpoena duces tecum to Uly O. Thompson issued.

1941

Jan. 8—Hearing had before Mr. Arundell on the merits. Submitted. Briefs due 45 days. Reply briefs 15 days.

Jan. 22—Transcript of hearing 1/8/41 filed.

Feb. 21—Brief filed by General Counsel.

Feb. 24—Brief filed by taxpayer. 2/24/41 copy served on General Counsel.

March 12—Reply brief filed by taxpayer. (O. K. Mr. Arundell.)

Nov. 7—Findings of fact and opinion rendered, Arundell, #7. Decision will be entered for the petitioner. 11/7/41 copy served.

Nov. 7—Decision entered. Arundell, Division 7.

1942

Feb. 2—Petition for review by U. S. Circuit Court of Appeals, 5th Circuit, with assignments of error filed by General Counsel.

Feb. 10—Proof of service filed by General Counsel. (2).

March 21—Agreed statement of evidence lodged, with statement of service by mail thereon.

March 21—Praecipe for record filed by General Counsel, with statement of service by mail thereon.

March 27—Proof of service of filing praecipe for record filed by General Counsel.

March 27—Proof of service of lodging statement of evidence filed by General Counsel.

March 28—Agreed statement of evidence approved and ordered filed.

United States Board of Tax Appeals

July 20, 1940

UNITED STATES BOARD OF TAX APPEALS

MOLINE PROPERTIES, INC., a Florida Corporation, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 103862

PETITION

The above named Petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, (It:R:HEB:90D) dated April 24, 1940, and as a basis of its proceedings alleges as follows:

(1) The petitioner is a corporation organized under the laws of the State of Florida, located at 1126 Ingraham Building, Miami, Florida.

(2) The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on April 24, 1940.

(3) The taxes in controversy are income taxes for the calendar years ended December 31, 1935, and December 31, 1936, in the amount of $4,993.82, and excess profit taxes for the same years in the amount of $4,344.95, together with penalties of $788.35.

(4) The determination of tax set forth in said notice of deficiency is based upon the following error: In that the respondent determined that the petitioner corporation is taxable on the profits resulting from the sale in 1935 and 1936 of the property herein below described, whereas, in truth and in fact, petitioner was a so-called "dummy" corporation and the profit from the sale of said property is taxable to one Uly C. Thompson, who was then the owner of all of the capital stock of said corporation, and the beneficial owner of said property.

(5) The facts upon which the petitioner relies, as a basis for this proceeding, are as follows:

During the year 1928 the said Uly O. Thompson was the owner in fee simple of four lots situated in Miami Beach, Florida, and described as follows:

> Lots One (1), Two (2), Three (3) and Four (4), in Block Seventy-seven (77) of FISHER'S FIRST SUBDIVISION OF ALTON BEACH, FLORIDA, according to plat thereof recorded in Plat Book 2, page 77, of the Public Records of Dade County, Florida.

The title to said lots was incumbered by two mortgages. One of these mortgages, dated March 18, 1926, was held by the Miami Beach Bank & Trust Company, a subsidiary of the Bank of Bay Biscayne, and secured the payment of a promissory note in the principal sum of $20,000.00, which the said Uly O. Thompson had made and delivered to said bank to evidence a loan it had made to him in that amount.

In addition to these two mortgages the aforesaid property was also encumbered by tax liens, aggregating approximately $6,000.00, and in 1928 the said Uly O. Thompson applied to the Bank of Bay Biscayne for a loan to enable him to pay the delinquent taxes represented by said tax liens. The Bank agreed to lend Mr. Thompson a sum sufficient to liquidate said taxes provided he would transfer his title to the aforesaid lots to a corporation to be organized by said bank, and provided he would thereupon pledge all of the capital stock of said corporation with the said bank as collateral security for the payment of said loan. In order to comply with this condition the said Thompson thereupon authorized the said bank to organize the petitioner corporation at his expense, and after its organization he conveyed title to the aforesaid lots to that corporation in exchange for all of its capital stock. At the same time, and in compliance with the bank's stipulation for said loan, the certificates for all of the capital stock of the petitioner corporation were endorsed in blank and delivered to the said bank, and, further complying with the said bank's demands, the said Thompson at the same time, entered into a voting trust agreement wherein and whereby he appointed an employee of said bank as his trustee to vote said stock. Said trustee, acting under the authority of said agreement, then set up a Board of Directors for the petitioner corporation composed entirely of employees and representatives of said bank.

During the year 1930 the Bank of Bay Biscayne failed and thereafter the said Thompson effected a compromise settlement of his aforesaid indebtedness to said bank. The Liquidator of said bank then turned over to the said Thompson the minute book, stock book and charter of said corporation, together with the aforesaid certificates of stock, which he had theretofore endorsed in blank and delivered to said bank.

During the years 1934, 1935 and 1936, the said Thompson sold the aforesaid real estate in three parcels, and in

each instance caused petitioner corporation to execute and deliver a deed to the purchaser of said property. The first two of the above-mentioned sales was erroneously reported in income tax returns filed in the name of said corporation, but the latter of said sales was reported by the said Uly O. Thompson in his individual income tax return. The profit from said two latter sales was erroneously determined by the respondent to be taxable to petitioner corporation, and this appeal is filed from that determination.

The petitioner corporation at no time had any assets other than the four lots above described. It never engaged in any activities save and except those hereinabove described which were made necessary by the aforementioned demands of the Bank of Bay Biscayne, and except to execute the necessary deeds of conveyance when the said Uly O. Thompson consummated the sale of the aforesaid property. It was at all times intended that the petitioner corporation would merely be the repository for the title to said property to comply with the bank's aforesaid demand, and it was never intended that the corporation would engage in, and it never did engage in any business activities. It did not keep any books of account. It had no place of business, no employees or bank account. The expenses relating to the aforesaid property were paid by the said Uly O. Thompson and the proceeds from the aforesaid sales were deposited in the bank account of the said Thompson and used by him.. The sole and only function of the petitioner corporation since its organization was to hold title to the four lots above described.

WHEREFORE, the petitiner prays that the Board may hear this proceeding and find that the petitioner was a so-called "dummy" corporation, and that it is not liable for the payment of income and excess profits taxes for the calendar years 1935 and 1936 on the profits resulting from the sale of the aforesaid real estate during those years.

Douglas D. Felix
Miami, Flirida.
Attorney for Petitioner.
Congress Building
B. M. Smethurst
Counsel for Petitioner.
Langford Building
Miami, Florida.

STATE OF FLORIDA)
) ss.
COUNTY OF DADE)

ULY O. THOMPSON, being by me first duly sworn, deposes and says that he is President of the Moline Properties, Inc., a Florida corporation, the petitioner herein, and as such officer is duly authorized to verify the foregoing petition; that he has read said petition and that the statements contained therein are true.

Uly O. Thompson.

SWORN to and subscribed before me this 19th day of July, A. D. 1940.

Anne Cowart
Notary Public
State of Florida at Large.

My Commission expires Jan. 13. 1941.

SN-IT-3

TREASURY DEPARTMENT

Internal Revenue Service.

April 24, 1940

Office of
Internal Revenue Agent
in Charge

Jacksonville Division

IT:R:EEB:90D

LS

Moline Properties, Inc.,

c/o Judge Uly O. Thompson,

1126 Ingraham Building,

Miami Florida.

Sirs:

You are advised that the determination of your income tax liability for the taxable year(s) ended Dec. 31, 1935 & 1936 discloses a deficiency of $4,993.82, and that the determination of your excess profits tax liability for the year(s) mentioned discloses a deficiency of $4,-344.95 as shown in the statement attached, together with penalties of $788.35.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to

the Internal Revenue Agent in Charge, Jacksonville Fla., for the attention of IT:R:EEB.

The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

Guy T. Helvering,

Commissioner.

By

(Signed) Harley Howard

Internal Revenue Agent in Charge.

Enclosures:

Statement.

Form of waiver.

Exhibit "A"

STATEMENT

IT:R:EEB:90D

LS

Moline Properties, Inc.

c/o Judge Uly O. Thompson

1126 Ingraham Building.

Miami, Florida.

Tax Liability for the Taxable Years Ended

December 31, 1935 and 1936.

Year	Liability	Income Tax Assessed	Deficiency
1935	$1,869.12	$801.93	$1,067.19
1936	3,926.63	None	3,926.63
Total	$5,795.75	$801.93	$4,993.82
	Excess-Profits Tax		
1935	$ 617.35	$229.29	$ 388.06
1936	3,956.89	None	3,956.89
Total	$4,574.24	$229.29	$4,344.95
10% Delinquency Penalty for 1936			$ 788.35

In making this determination of your tax liability, careful consideration has been given to the internal revenue agent's report dated May 22, 1939.

Taxable Year Ended December 31, 1935

Adjustment to Net Income

Net income reported on return	$ 5,832.19
Unallowable deductions and additional income:	
(a) Capital gain	7,761.38
Net income adjusted	$13,593.57

Explanation of Adjustment

(a) Capital gain on sale of real estate has been included to the extent of the total amount received on said sale in view of the fact that the entire cost of the assets disposed of had been recovered in prior years.

Computation of Tax.

Taxable net income	$13,593.57
Tax at 13-3/4%	$1,869.12
Less: Tax previously assessed, original, account #401517	801.93
Deficiency income tax	$ 1,067.19
Taxable net income	$13,593.57
Less: 12½% of $9,971.89 value of capital stock as declared in capital stock tax return for the year ended June 30, 1935	1,246.49
Subject to excess-profits tax	$12,347.08
Excess-profits tax at 5%	$ 617.35
Less: Tax previously assessed, original, account # 401517	229.29
Deficiency excess-profits tax	$ 388.06

Taxable Year Ended December 31, 1936

Adjustment to Net Income

Net income reported on return	$ None
Unallowable deductions and additional income:	
(a) Capital gain	32,974.07
Net income adjusted	$32.974.07

Explanation of Adjustment

(a) Profits on sale of real estate not reported on original return has been included as taxable income. Detailed computation of profit is shown as follows:

Sale price		$40,000.00
Less:		
Proration of interest	$ 518.85	
Proration of taxes	3,814.74	
Commissions	2,000.00	
Stamps	80.00	
Recording	1.35	
Abstract	61.00	
Title Insurance	100.00	
Ocean strip—cost (1936)	450.00	7,025.93
Profit realized		$32,974.07

Computation of Tax

Excess-Profits Tax:	
Taxable net income	$32,974.07
Less: 10% of no-declared value of capital stock as declared in capital stock tax return for the year ended June 30, 1936	None
Subject to excess-profits tax	$32,974.07
Excess-profits tax at 12%	$ 3,956.89
Less: Tax previously assessed, original, account #855350	None
Deficiency excess-profits tax	$ 3,956.89
Income Tax:	
Normal Tax:	
Taxable net income	$32,974.07
Less excess-profits tax (cash basis)	None
Subject to normal tax	$32,974.07
Tax at 8% on $2,000.00	$ 160.00
Tax at 11% on $13,000.00	1,430.00
Tax at 13% on $17,974.07	2,336.63
Total normal tax	$ 3,926.63

Surtax on Undistributed Profits:		
Taxable net income		$32,974.07
Less: Excess-profits tax	$ None	
Normal tax	3,926.63	3,926.63
Adjusted net income		$29,047.44
Less dividends—paid credit		32,974.07
Undistributed net income		None
Surtax		None
Normal tax		3,926.63
Total income tax		$ 3,926.63
Less: Tax previously assesed, original, account #855350		None
Deficiency income tax		$ 3,926.63
10% delinquency penalty on total liability for 1936		$ 788.35

UNITED STATES BOARD OF TAX APPEALS

United States Board of Tax Appeals

Received Aug 30 1940

Filed Aug 30 1940

MOLINE PROPERTIES, INC., a Florida Corporation,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
} Docket No. 103862

ANSWER

COMES now the respondent, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue,

and for answer to the petition filed in the above entitled appeal, admits and denies as follows:

(1), (2), and (3) Admits the allegations contained in paragraphs (1), (2), and (3) of the petition.

(4) Denies the allegations of error contained in paragraph (4) of the petition.

(5) Admits that during the years 1934, 1935, and 1936, certain sales of real estate were made, and the petitioner corporation executed and delivered deeds to the purchaser of said properties. Specifically denies that the sales were made by Uly O. Thompson or that the real estate was owned by said Thompson. Further admits that the profit from the sales in the latter two years was determined by the respondent to be taxable to the petitioner corporation. Denies all other allegations contained in paragraph (5) of the petition.

(6) Denies generally and specifically each and every allegation contained in the petition not heretofore admitted, qualified, or denied.

WHEREFORE, it is prayed that the appeal be denied and that the Commissioner's determination be approved.

(Signed) J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

OF COUNSEL:
Frank M. Thompson, Jr.,
Division Counsel,

F. L. Van Haaften,
Special Attorney,
Bureau of Internal Revenue.

UNITED STATES BOARD OF TAX APPEALS

MOLINE PROPERTIES, INC.,
A FLORIDA CORPORATION, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

Docket No. 103862. Promulgated November 7, 1941

Petitioner was organized in 1928 to take title to certain mortgaged real property on which the mortgagee agreed to advance further funds on condition that the petitioner should be organized. The stock was pledged with the mortgagee. In 1933 the mortgages were discharged with funds secured from a new mortgage loan. The property was sold in three parcels in 1934, 1935, and 1936. Held, petitioner functioned as a mere agent and its existence must be disregarded in taxing gain on the sale of the property.

Douglas D. Felix, Esq, for petitioner.

F. L. Van Haaften, Esq., for the respondent.

This proceeding is brought for redetermination of the following deficiencies:

Calendar year	Income tax	Excess profits tax
1935	$1,067.19	$ 388.06
1936	3,926.63	3,956.89

The respondent has added a 10 percent delinquency penalty for the year 1936 in the amount of $788.35.

The issue here is whether the petitioner's sole stockholder is entitled to report the income of the petitioner

from the sale of real property as his income, treating the petitioner as a corporation without substance.

FINDINGS OF FACT.

The petitioner is a corporation, organized under the laws of Florida in 1928. Its president and sole stockholder, with the exception of those holding qualifying shares, throughout the period from the time of its organization down through the taxable years, was Uly O. Thompson. Tax returns for the years in question were filed with the collector for the district of Florida.

On August 17, 1920, Thompson acquired four lots of unimproved realty situated in Dade County, Florida, which he mortgaged in 1923 to William F. Whitman for a $20,000 debt. On March 18, 1926, he gave a second mortgage to the Miami Beach Bank & Trust Co. to secure an additional indebtedness of $20,000.

Subsequently the mortgaged land did not prove profitable to Thompson and he allowed taxes due on the property to remain unpaid. In 1928 back taxes were owing in the sum of $6,500. At this time Thompson was told by the second mortgagee that the taxes must be paid to prevent loss of the property and the following agreement was reached whereby this was accomplished: The Bank of Bay Biscayne, an affiliate of the Miami Beach Bank & Trust Co., agreed to loan Thompson $6,750 for the payment of taxes provided he convey title to the property to a corporation organized by the bank to hold such title. Stock of the corporation was to be issued to Thompson but was to be pledged as collateral for the loan and be placed by him in a voting trust of which an officer of the bank should be trustee with power to vote the stock for [redacted] purposes. The trust was to cease either on the payment of the loan or on the sale of the stock pledged as collateral. Pursuant to this agreement Thompson, on June 5, 1928, conveyed the property to the petitioner corporation, which had been organized

also pursuant to the agreement, and received in return all of the petitioner's stock, with the exception of qualifying shares. He thereupon executed a trust agreement conveying that stock to the voting trustee. The corporation assumed and agreed to pay the mortgages on the property.

The Bank of Bay Bicayne closed during the year 1930 and thereafter its powers under the voting trust were exercised by the liquidator of the bank. During this period a suit was instituted to remove certain restrictions imposed on the property by a prior deed. Expenses connected with this suit in the sum of $4,005.39 were paid by Thompson in 1933 and subsequent years. The peittioner was also required to defend certain condemnation proceedings during this period.

The petitioner on October 1, 1929, purchased from the Bank of Bay Biscayne a note of Uly O. Thompson, together with a mortgage securing it, in the amount of $43,000, on which interest of $9,703.14 was due, at its par value plus accrued interest. The petitioner gave its note for the purchase money, securing it with Thomson's mortgage which it received on the purchase of the note.

On July 29, 1933, the petitioner discharged and satisfied the two mortgages which were outstanding on the property owned by it, each in the amount of $20,000. Funds for these discharges were obtained by Thompson through a loan which he negotiated with the National Investment Holdings, Inc. This loan was secured by a mortgage on a portion of the proerty in question. The debt of $6,750 owed to the Bank of Bay Biscayne was settled by the petitioner during 1933. Control of the petitioner corporation was returned to Thompson in 1933.

The mortgage debt owed to the National Investment Holdings, Inc., was paid in 1936 through the sale of a portion of the mortgaged property.

The petitioner did not keep books of account or maintain a bank account during the period of its existence. It owned no assets other than the real estate described above. It leased a portion of its properties in 1934 for a parking lot, from which it received rental of $1,000. Thompson owned other extensive real property in Miami, title to all of which was in his name individually.

The real property held by the petitioner was sold in three separate parcels, one in each of the years 1934, 1935, and 1936. Proceeds of these sales were received by Thompson and deposited in his bank account. The sales made in 1934 and 1935 were reported in the returns of the petitioner, which were prepared by an auditor retained by Thompson. A loss of $698.11 was reported for 1934 and a gain of $5,851.94 for 1935. Subsequently Thompson was advised by his auditor that, due to the circumstances of the petitioner's organization, gain on these sales might be reported by Thompson and a claim for refund of tax accordingly filed on the petitioner's behalf for 1935. In a delinquent return filed on December 2, 1938, Thompson reported the 1935 gain as his individual gain. Gain on the 1936 sale was reported by Thompson in the amount of $3,829.14.

Thompson was, during the year 1934 and a part of the year 1935, a circuit judge of the State of Florida. His salary was his principal source of income. When his office was abolished in 1935 he returned to the practice of law.

The petitioner corporation has not been dissolved; however, it has transacted no business since the sale of its property in 1936.

OPINION.

ARUNDELL: The petitioner here seeks to be relieved from reporting gain on the sale of real property to which it held title, and to have that gain taxed to its sole stock-

holder. It argues that the purpose for which it was established and the limited scope of its function render it so unsubstantial as to require us to disregard it in fixing tax liability.

The answer to this argument, the respondent contends, is that the original limited purpose for which the petitioner was organized was terminated in 1933 and that during the taxable years it must be regarded as an ordinary taxable corporation, especially in view of its activities in renting and selling its realty holdings.

There is some substance in the latter contentions and in the presence of evidence of additional activity on the petitioner's part in 1935 and 1936 we should perhaps incline to the respondent's view. However, as we regard the issue, it reduces to a question of whether limited activities involving the sale of vacant property and the rental of a portion of it during a part of the interim, carried through by a corporation of the type we have consistently disregarded, after the reasons for its organization have lapsed, can convert the petitioner into a substantial concern which must be taxed separately. The answer is to be found in the facts. The organization of the petitioner was undertaken at the suggestion of Thompson's creditors as a means of protecting their investments and of saving his equity in certain Florida real estate. Control of the corporation was placed in the bank. It had no activities from that time until 1933 except one transaction of somewhat dubious character whereby the bank apparently sought to charge the petitioner with an additional debt of Thompson. During the year 1933 the creditors instigating its organization were paid by Thompson and control of the petitioner was returned to him. Settlement of the indebtedness was made with borrowings from other sources. The corporation continued to exist down through the taxable years, sales of its holdings being made in each of the intervening years. No other activities were carried on by it except rental of a portion of the property in 1934

for use as a parking lot. It maintained none of the equipment or paraphernalia ordinarily associated with the corporate form, including offices, employees, books, or other records.

From this review of the circumstances before us it must be apparent that the petitioner existed for very limited purposes. The primary purpose, the protection of the stockholders' creditors, was one which we have considered before. Abrams Sons' Realty Corporation, 40 B. T. A. 653. There we held that a corporation, organized to hold title to mortgaged property, to protect the mortgagees and to secure an equitable distribution of the proceeds when the land was condemned, should be disregarded in taxing any gain resultant on the condemnation. See also Thrift Realty Co., 29 B. T. A. 545.

The limited activities for which it was maintained thereafter do not alter its essential nature. It continued merely as a holder of title. Full beneficial ownership was in Thompson, who continued to manage and regard the property as his own individually. We have frequently held that a corporation which existed merely to facilitate the passage of title to real estate, where its stockholders acted without regard for the corporate entity, was a mere figmentary agent which should be disregarded in the assessment of taxes. Mark A. Mayer, 36 B. T. A. 117; J. L. McInerney, 29 B. T. A. 1; affd., 82 Fed. (2d) 665; Stewart Forshay, 20 B. T. A. 537.

These cases give adequate answer to the respondent's chief contentions. It is true that the petitioner was not organized originally for the purpose for which it was maintained during the taxable years. Both puorposes, however, fall within the holdings wherein we have disregarded the corporate entity to effect a more realistic assessment of taxes. The final circumstance of rentals collected in 1934 falls in the category of a limited incidental operation which was undertaken without dis-

turbing the essential functioning of the petitioner. Its minor character renders it of no effect on our conclusion.

The case of Fleming G. Railey, 36 B. T. A. 543, relied on by the respondent, is not applicable here, where it is plain that Thompson did not organize the petitioner as a "shield against judgment creditors." Cf. also Sheldon Building Corporation v. Commissioner, 118 Fed. (2d) 835.

The petitioner must accordingly be sustained.

Decision will be entered for the petitioner.

UNITED STATES BOARD OF TAX APPEALS

WASHINGTON

MOLINE PROPERTIES, INC., A Florida Corporation, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent,	Docket No. 103862

DECISION

Pursuant to the determination of the Board, as set forth in its Findings of Fact and Opinion, promulgated November 7, 1941, it is

ORDERED and DECIDED: That there are no deficiencies in income tax or excess-profits tax for the years 1935 and 1936, and there is no delinquency penalty for the year 1936.

(S) C. R. ARUNDELL,
Member

ENTERED NOV. 7, 1941.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT

United States Board of Tax Appeals

Received Feb 2 1942

Filed Feb 2 1942

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner on Review, v. MOLINE PROPERTIES, INC., Respondent on Review.	B. T. A. Docket No. 103862

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR

To the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

NOW COMES Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Charles E. Lowery, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

JURISDICTION

That he is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States holding his office by virtue of the laws of the United

States; that the respondent on review, Moline Properties, Inc. (hereinafter referred to as the taxpayer), is a corporation organized under and existing by virtue of the laws of the State of Florida, having its principal office in Miami, Florida. The taxpayer filed its Federal corporation income and excess-profits tax returns for the taxable years 1935 and 1936 with the Collector of Internal Revenue for the District of Florida, whose office is located in the City of Jacksonville, Florida, and within the judicial circuit of the United States Circuit Court of Appeals for the Fifth Circuit.

The Commissioner files this petition pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

II.

PRIOR PROCEEDINGS

On April 24, 1940, the Commissioner determined deficiencies in Federal income taxes against the taxpayer for the calendar years 1935 and 1936 in the respective amounts of $1,067.19 and $3,926.63, deficiencies in excess-profits taxes for the calendar years 1935 and 1936 in the respective amounts of $388.06 and $3,956.89, and a ten percent delinquency penalty for the calendar year 1936 in the amount of $788.35. A notice of the deficiencies so determined was sent to the taxpayer by registered mail on April 24, 1940, in accordance with the provisions of existing internal revenue laws. Thereafter and on July 20, 1940, the taxpayer filed an appeal from the said determination of the Commissioner with the United States Board of Tax Appeals.

The case was duly tried to the United States Board of Tax Appeals and on November 7, 1941, the Board promulgated its opinion (45 B. T. A. No. 105), pursuant to which opinion it entered its decision on the same date wherein and whereby it was ordered and decided "that

there are no deficiencies in income tax or excess profits tax for the years 1935 and 1936, and there is no delinquency penalty for the year 1936".

III.

NATURE OF CONTROVERSY

The question presented to the Board of Tax Appeals for its consideration and which was answered by the Board contrary to the Commissioner's determination is whether the income derived by the taxpayer from the sale of certain parcels of real property was taxable to the taxpayer corporation as determined by the Commissioner or to the corporation's sole stockholder as claimed by the taxpayer. Briefly stated the facts are as follows:

The taxpayer, a Florida corporation, was organized in 1928. Its stock, except qualifying shares, was held by Uly O. Thompson. Thompson had acquired certain unimproved realty in 1920 situated in Dade County, Florida, which he mortgaged in 1923 to William F. Whitman for a $20,000 debt. In 1926 he gave a second mortgage on the property to the Miami Beach Bank & Trust Company to secure an additional indebtedness of $20,000. By 1928 unpaid back taxes on the property were owing in the amount of $6,500. Thompson was then notified by the second mortgagee that the unpaid taxes would have to be paid to prevent the loss of the property. Thereafter an affiliate of the second mortgagee agreed to loan Thompson $6,750 for the payment of taxes provided that he would convey title to the property to a corporation organized by the bank. Accordingly on June 5, 1928, Thompson conveyed the property to the taxpayer here involved, the corporation which was organized for the purpose of receiving title. All of the taxpayer's stock was issued to Thompson who thereupon executed a trust agreement conveying the stock to an officer of the bank as voting trustee. The taxpayer also assumed and agreed to pay the mortgages on the property.

In 1930 The Bank of Bay Biscayne, the affiliate hereinabove mentioned, closed and its powers under the voting trust were thereafter exercised by the liquidator of the bank. In 1933 the taxpayer discharged and satisfied the two $20,000 mortgages on the property through a loan which Thompson negotiated with National Investment Holdings, Inc., and secured by a mortgage on a portion of the property. The debt of $6,750 owing to the Bank of Bay Biscayne was likewise settled by the taxpayer in 1933 and control of the corporation was returned to Thompson. In 1936 a portion of the mortgaged property was sold and the debt owed to National Investment Holdings, Inc., was paid.

A portion of the taxpayer's properties was leased in 1934 for a parking lot from which a rental of $1,000 was received. The real property in question was sold in three separate parcels in the years 1934, 1935, and 1936, the proceeds from which sales were received by Thompson and deposited in his bank account. The corporation here involved reported the sales in its 1934 and 1935 returns. Thompson having been advised by his auditor that the gain on these sales might be reported by him instead of the corporation, a claim for refund was filed by the corporation for the year 1935 and a delinquent return was filed for Thompson in which the 1935 gain was reported. The 1934 return of the taxpayer showed a loss. A gain on the 1936 sale was reported by Thompson in the amount of $3,829.14. The taxpayer corporation is still in existence.

In his notice of deficiency the Commissioner determined that the taxpayer corporation was taxable on the profits resulting from the sales made in 1935 and and 1936 of the properties held by the corporation. In its appeal to the Board of Tax Appeals from the Commissioner's determination the taxpayer contended that the corporation was merely a "dummy" corporation, that Uly O. Thompson, the owner of its capital stock, was the beneficial owner of the property, and that, accord-

ingly, Thompson rather than the corporation was taxable on the profits derived from the sales of the property. From the facts as found by the Board of Tax Appeals, it reached the conclusion that the taxpayer functioned as a mere agent and its existence must be disregarded in taxing gains derived from the sales of the property. Accordingly, the Board entered its judgment of no deficiencies.

IV.

ASSIGNMENTS OF ERROR

The Commissioner avers that in the record and proceedings before the United States Board of Tax Appeals and in the opinion and final decision rendered and entered by the United States Board of Tax Appeals, manifest error occurred and intervened to the prejudice of the Commissioner who now assigns the following errors and each of them, which he avers occurred in said record, proceedings, opinion, and final decision so rendered and entered by the United States Board of Tax Appeals:

The United States Board of Tax Appeals erred—

1. In ordering and deciding "that there are no deficiencies in income tax or excess profits tax for the years 1935 and 1936, and there is no delinquency penalty for the year 1936."

2. In failing and refusing to sustain the determination of the Commissioner.

3. In holding and deciding that the taxpayer "functioned as a mere agent and its existence must be disregarded in taxing gain on the sale of the property."

4. In failing and refusing to hold and decide that the taxpayer served a legitimate corporate purpose and in

such capacity was taxable on the income derived from the sale of the real estate sold in the years 1935 and 1936.

5. In that its opinion and decision are contrary to its findings of fact.

6. In that its opinion and decision are not supported by its findings of fact and are contrary to law.

WHEREFORE, the Commissioner petitions that the decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Fifth Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Signed) Samuel O. Clark, Jr.
Assistant Attorney General.

(Signed) J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

OF COUNSEL:

CHARLES E. LOWERY,
Special Attorney,
Bureau of Internal Revenue.

UNITED STATES OF AMERICA)
) ss.
DISTRICT OF COLUMBIA)

CHARLES E. LOWERY, being duly sworn, says that he is a Special Attorney in the Bureau of Internal

Revenue, and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

(Sgd) Charles E. Lowery

Sworn and subscribed to before me
this 31st day of January, 1942.

(Sgd) George W. Kreiz,
Notary Public

My commission expires November 15, 1942.

United States Board of Tax Appeals

Received Feb 10 1942

Filed Feb 10 1942

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner on Review, v. MOLINE PROPERTIES, INC., Respondent on Review.	B. T. A. Docket No. 103862

NOTICE OF FILING PETITION FOR REVIEW

To:

Moline Properties, Inc.,
1126 Ingraham Building,
Miami, Florida.

You are hereby notified that the Commissioner of Internal Revenue did, on the 2nd day of February, 1942, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Fifth Circuit of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review and assignments of error as filed is hereto attached and served upon you.

Dated this 2nd day of February, 1942.

(Signed) J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 5th day of February, 1942.

MOLINE PROPERTIES, INC.

By
(Sgd.) Uly O. Thompson,
President.

United States Board of Tax Appeals

Received Feb 10 1942

Filed Feb 10 1942

IN THE UNITED STATES CIRCUIT COUURT OF APPEALS FOR THE FIFTH CIRCUIT

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner on Review, v. MOLINE PROPERTIES, INC., Respondent on Review.	B. T. A. Docket No. 103862

NOTICE OF FILING PETITION FOR REVIEW

To:

Douglas D. Felix, Esq.,
Congress Building,
Miami, Florida.

You are hereby notified that the Commissioner of Internal Revenue did, on the 2nd day of February, 1942, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Fifth Circuit of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review and assignments of error as filed is hereto attached and served upon you.

Dated this 2nd day of February, 1942.

(Signed) J. P. Wenchel,
Chief Counsel
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 5th day of February, 1942.

(Sgd) Douglas D. Felix,
Attorney for Respondent on Review.

United States Board of Tax Appeals

Received Mar 21 1942

Lodged Mar 21 1942

Filed Mar 28 1942

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner on Review, v. MOLINE PROPERTIES, INC., Respondent on Review.	B. T. A. Docket No. 103862

STATEMENT OF EVIDENCE

The following is a statement of the evidence In the above-entitled cause:

The proceeding came on for hearing at Miami, Florida. before the Honorable C. Rogers Arundell, Member of the United States Board of Tax Appeals on January 8, 1941. The taxpayer was represented by its counsel Douglas D. Felix, Esq., Miami, Florida, and the Commissioner of Internal Revenue was represented by his counsel F. L. Van Haaften, Esq.

R. K. MIXSON, a witness on behalf of the petitioner was duly sworn and testified as follows:

My address is 1601 Onaway, Miami Beach. In 1928 I was assistant vice president of the Bank of Bay Biscayne and one of the loan committee. I am familiar with the circumstances leading up to the incorporation of Moline Properties, the petitioner in this case. Mr. Thompson owed the Miami Beach Bank and Trust Company, which was an affiliated bank, at least a bank owned and controlled by the same directors as the Bank of Bay Biscayne, and his taxes were past due, subject to sale. The president of the Biscayne Bank called him in and told him he would have to do something about it or they would have to foreclose the mortgage over at the Beach; that if he would let the bank organize a corporation, transfer the property to the corporation, that the Bank of Bay Biscayne would loan him sufficient money to pay the taxes. Mr. Thompson agreed to that and the bank had its attorneys organize this corporation, I believe with the understanding that Mr. Thompson would assign all of the stock of the corporation to the bank as collateral to the loan, and also create a voting trust authorizing one of the officers of the Bank of Biscayne to vote the stock of the corporation organized, which was the Moline Properties.

On cross examination the witness testified as follows:

The bank closed June 11, 1930. Thereafter the bank still had control over the stock through the liquidator. I do not know when the liquidator ceased to have any control of the stock.

Q. When did you cease to become familiar with this corporation in so far as your actual knowledge of it in point of years? Would that be in 1928 when the liquidator was appointed?

A. No, 1930 when the liquidator was appointed. I was still an employee of the liquidator for one or two years after that.

Q. Do you know when this debt was liquidated with the bank?

A. No, I think it was after I left the employ. I believe it was still with the liquidator when I left his employ.

JUDGE ULY O. THOMPSON, a witness on behalf of the petitioner, was duly sworn and testified as follows:

I live at 3500 Moorings Drive, Coconut Grove. My office is at 1126 Ingraham Building, Miami. I was president of Moline Properties, Inc. in 1928 and was president of the company during its whole existence.

(The witness thereupon identified the minute book of Moline Properties, Inc.)

The minute book contains the complete minutes of the corporation, so far as I know. It was returned to me at the time of the liquidation of these debts in its present form. I had nothing to do with keeping the minutes with the exception of those purported minutes after I came in possession of that book, the last two I think, one or two minutes.

Q. And will you identify the minutes that you refer to that were drawn up after the corporation was returned from the bank?

A. Minute appearing as of July the 15th, 1933, and subsequent minutes as they appear in this book.

(The minute book was thereupon offered and received in evidence as petitioner's exhibit No. 1.)

The witness thereupon identified the stock book of Moline Properties, Inc. and testified that it was a complete record of all stock transactions.

(The stock book was thereupon offered and received in evidence as petitioner's exhibit No. 2.)

Q. I now hand you from this book stock certificates numbered 1, 2, 3, and 4, and will ask you if you can identify the signatures endorsing those certificates on the back.

A. Certificate No. 3 was issued to my secretary, Miss Sinclair, and bears her blank endorsement. Certificate No. 2 was issued to my brother, who was an associate in my office, and it bears his blank endorsement. Certificate No. 1 was issued to me for three shares, and it bears my blank endorsement. Certificate No. 4 for 20 shares was issued to me and bears my blank endorsement. That constituted all of the stock of Moline Properties.

I am familiar with the circumstances leading up to the incorporation of the Moline Properties, Inc. I don't recall the date, but some time prior to 1925 I was engaged by the Bank of Bay Biscayne to incorporate an affiliate bank at the Beach, known as the Miami Beach Bank and Trust Company, and I procured the charter for that bank. On the way to the office one morning I stopped at the bank. As I recall, Mr. Ben Shepard was president, and I borrowed $20,000 on my personal note, with no security.

Subsequently to that time it became necessary to secure that loan and at the suggestion of the Mr. Gilman, who was a director in both banks, and other officials, I executed a second mortgage on a block of lots that I owned at the Beach, known as Block 77, Fisher's First Subdivision of Alton Beach, just across the street from my home.

This little block faced on the ocean front, and subsequently a night club was built right up against it, although my property was in the restricted residence subdivision.

Conditions grew worse and I couldn't pay the taxes on the property, and they accumulated to in the neighborhood of $6500, and I had a conference with Mr. Gilman at his solicitation and direction.

Mr. Gilman was president of the Bank of Bay Biscayne and controlling director, I think, of the other bank. I think he controlled both banks. And he told me that it was necessary for those taxes to be taken care of or we all stood to lose the property, and I knew that that was true. And he said that the Bank of Bay Biscayne, not the bank at the Beach, would loan me $6750 with which to pay the existing taxes on Block 77, but they were not going to do it unless I authorized the bank to form a corporation in which to place title to my property at the Beach, and that when the corporation was formed I would have to hypothecate all of the stock of the corporation to secure the tax money loan; that I would further have to give a voting trust to some officer of the bank to vote all of the stock of the corporation at any time they saw fit. And all that was done.

I authorized him to go ahead and form the corporation, and when these minutes introduced in evidence were brought up to my office for me to sign, something in there, the first minutes; the first time I ever saw the book I am sure I signed something. I haven't checked those minutes for six months. But they were brought up to my office with the corporate papers and the things for me to sign, and I signed whatever was brought up there. I remember we had some pleasantry with Mr. Sterne, who brought that over, I think. I asked him where in the world did he get the name of "Moline Properties?" And that is the way the corporation was formed. It was purely a receptacle to hold the title to this property in order to get the bank to loan that money, take care of the taxes.

The witness thereupon identified his signature and the signature of his wife on a mortgage deed to the

Miami Beach Bank and Trust Company dated March 18, 1926. The mortgage deed was offered and received in evidence as petitioner's exhibit No. 3.

A photostat copy of a deed dated August 17, 1920, by which Marie Vance Bowman and her husband conveyed Block 77 to Uly O. Thompson was offered and received in evidence as petitioner's exhibit No. 4.

Thereupon the witness identified the signatures on the voting trust dated June 5, 1928 between Uly O. Thompson, Muta Sinclair and Robert Thompson, parties of the first part, and Edward Sterne, as party of the second part and testified that it was the voting trust to which he had previously referred to in his testimony. The voting trust was offered and received in evidence as petitioner's exhibit No. 5.

The witness thereupon identified a warranty deed dated June 5, 1928, between Uly O. Thompson, joined in by his wife, Grace B. Thompson, and Moline Properties, Inc., which deed was offered and received in evidence as petitioner's exhibit No. 6.

Q. (BY MR. FELIX) I call your attention, Judge Thompson, to this paragraph appearing in Petitioner's Exhibit No. 6, which reads as follows:

"As to both of the above described mortgages, the grantee herein, by its acceptance of this deed, hereby assumes and agrees to pay said mortgages and debts secured thereby, together with interest, as part of the purchase price of the above described premises."

Will you please examine that exhibit and tell me what mortgages are referred to by that paragraph just read?

A. A first mortgage that I had previously given to Mr. William F. Whitman, under date of August

8, 1923, securing a first obligation on this property, $20,000. The second mortgage which I had subsequently given under date of March 18, 1926, for $20,000, secured the note that I owed the Miami Beach Bank and Trust Company.

That assumption was put in there because the Bank of Bay Biscayne had authority to sell the collateral and deliver title to that property. They wanted the privilege of the right to apply all proceeds to the liquidation of those two mortgaes. And I might add that I was never at any time relieved of liability on the mortgages, personal liability, because there was never any substitution of notes. It was drawn by the Bank of Bay Biscayne through their attorney, Mr. Freeman Burdine; or that office, Burdine, Terry & Fleming.

Miss Thelma Cain, Miss Lurline Jackson, and Miss Agnes Protho were the incorporators of Moline Properties, Inc.

Q. Do you know who represented the bank in the organization of this corporation?

A. My negotiations—I had one conference, I think, with Mr. Freeeman Burdine, who headed the firm of Burdine, Terry & Fleming, and he was one of the old lawyers in the city, who represented for years the Bank of Bay Biscayne. Mr. Burdine is now dead, but his associates are still practicing law here in Miami.

That firm organized the corporation. Thelma Cain, Lurline Jackson, and Agnes Protho were stenographers in the office, and Miss Cain, who is now married, still works for Ed. Fleming. The loan was liquidated some time after the Bank of Bay Biscayne failed—after all the banks failed. My money was used to liquidate it. The $20,000 loan from the Miami Beach Bank and Trust Company has been liquidated.

Q. I now hand you two papers and ask if you can identify those papers.

A. The first paper that I am testifying about is a satisfaction of mortgage from M. A. Smith, as liquidator of the Miami Beach Bank & Trust Company, satisfying the second mortgage that I gave to the Miami Beach Bank & Trust Company under date of the 18th of March, 1926, and it is the identical second mortgage about which I have previously testified. That satisfaction is dated the 29th of July, 1933.

The second instrument exhibited is a satisfaction from the same officer as liquidator, M. A. Smith, as liquidator of the Miami Beach Bank & Trust Company, satisfying and liquidating the first mortgage on the identical promises that I had previously given to William F. Whitman under date of the 28th of July, 1923, securing $20,000, and which likewise was executed and dated the 29th of July, 1933, and both of them are recorded in the public records of this county.

THE BOARD MEMBER: What are they, releases?

MR. FELIX: Satisfaction of these mortgages given to the bank to secure this $20,000 indebtedness.

THE BOARD MEMBER: There is a release there of the first mortgage to you, isn't there? Why does the bank sign that? I thought that was given to somebody else.

THE WITNESS: Your Honor, Mr. Whitman owned the first mortgage on this identical property, Block 77, and he demanded that it be paid, and the bank, to whom I was also obligated, had to buy

the Whitman mortgage to protect itself. That was done some time before, I don't know when, but some time before either of the banks closed. It was necessary for them to take up the first mortgage to protect their second obligation. So when the bank closed it sat holding both these mortgages, and they came into the possession of the liquidator of the bank.

(The two releases or satisfactions were thereupon offered and received in evidence as petitioner's exhibit No. 7.)

Both of the mortgages were satisfied with funds that I borrowed from National Investment Holdings, a Florida corporation. Check No. 1113, under date of June the 26th, '33, is from National Investment Holdings, Incorporated, to me for $1500. Check No. 1123, under date of July the 17th, 1933, for $4,000 from National Investment Holdings. That constiuted the $5500 that I borrowed from that corporation, and some of the funds—I should say most of the funds there—was used in liquidating these two obligations and in addition taxes that had accumulated against the property.

(The two checks were offered and received in evidence as petitioner's exhibit No. 8.)

The only available security to the National Investment Holding Company for the loan of this money represented by the checks which have just been introduced into evidence that I had was my block of property at the Beach, Block 77. I gave a mortgage securing this loan—I caused the corporation—and the stock was then turned back to me to execute the mortgage. My impression is that none of these papers ever came into my hands until the obligation of the Beach bank was paid off. The liquidators held onto these securities and delivered them back to me in 1933, when these two satisfactions went of record. I was directly in control of the corporation in 1933.

(A photostat copy of the recorded mortgage from Moline Properties, Inc., to the National Investments Holding, Inc., was thereupon offered and received in evidence as petitioner's exhibit No. 9.)

During the time that the bank had control of this corporation it became necessary to bring a suit to remove the restrictions, the deed restrictions, that had been placed on the property by Carl Fisher, when he developed Fisher's first subdivision. The firm of Evans and Mershon brought that suit.

The witness then identified a letter dated Mary 9, 1936, from Evans & Mershon and a schedude attached to the letter of payments made by Uly O. Thompson to the firm from time to time, beginning in 1933 up through the year 1936, aggregating $2,500 and some dollars, and a statement of other payments made by the Miami Beach Bank & Trust Company, aggregating $1500 in the year 1930, in relation to the suit about which he had previously testified. The letter was offered and received in evidence as petitioner's exhibit 10.

The $1500 referred to represents the items on Petitioner's Exhibit No. 10 of March 15, 1930 and June 7, 1930. Those are the initial payments made by the Miami Beach Bank & Trust Company to Evans & Mershon on account of the $5,000 fee that the bank agreed to pay them for bringing the suit and removing the restrictions on Block 77 after Moline Properties was incorporated. I was not even consulted about that except I had authorized bringing the suit before the corporation was formed, and I knew that fees would be charged against me. The loan which was made from National Investment Holdings, Inc., was paid by me. I sold a piece of property over which I had given them a mortgage to Simms Brothers at Miami Beach and paid them the loan on the date of the sale. I received $40,000 cash and paid this loan out of the cash received.

(A photostat copy of a recorded satisfaction dated February 17, 1936, from National Investments Holdings, Inc., to Moline Properties, Inc., was offered and received in evidence as petitioner's exhibit No. 11.)

Moline Properties, Inc., never had a bank account and never had any books of account. The corporation had no assets except Block 77, the title to which I transferred to the corporation, for the purposes heretofore stated. At the time Moline Properties was organized I owned a home just across the street that I bought from Robert Hassler and paid him $65,000 for it. I owned, I believe, 101 lots as I recall, down on Miami and Brickell Avenue between here and the Deering Estate. Some of those lots were not on the Avenue, but the blocks faced on the Avenue. I had three blocks there of lots, four blocks, that faced on the Avenue, either Brickell or Miami Avenue. I owned other scattered unimportant holdings. Block 77 at that time and my home at the Beach were the only properties that had any appreciable prospective value. No real estate had any value following the debacle here in 1926. The other property that I owned was in my name and any other property that I have owned was in my name. I never organized a corporation. I have organized probably a hundred or more for other people, but I never put anything that I bought in a corporate name, or my wife's name either.

Q. Judge Thompson, I hand you Petitioner's Exhibit No. 1 and direct your attention to minutes of a directors' meeting dated October the first, 1929, in which the following appears:

"Thereupon the president, Uly O. Thompson, announced to the meeting that the Bank of Bay Biscayne had offered to sell to Moline Properties, Inc., a certain note of Uly O. Thompson in the principal sum of $43,000 and accrued interest of $9,703.14, which is secured to the satisfaction of the board, the sale being made at par with accrued interest.

"Thereupon the following resolution was adopted by uanimous vote:

"Be it resolved that this company do purchase said note, and in order to obtain the proper funds therefor, that they borrow the money from the Bank of Bay Biscayne, giving its note therefor due on or before six months after date and pledging as collateral the said note, the mortgage of Uly O. Thompson which it is purchasing, together with 25 shares of capital stock of Moline Properties, Inc., which is the entire amount issued and which is already pledged to said bank."

I will ask you whether you were present at that meeting, Judge Thompson.

A. I was not present. I never heard of that minute until all of these mortgages were liquidated and papers turned back to me.

Q. I call your attention to the fact that that minute, in addition to being dated October the first, 1929, has the further inscription "10 o'clock a. m.". I now hand you what purports to be an assignment of mortgage from the Bank of Bay Biscayne to Moline Properties, dated October first, 1929, at 11 a. m., and ask you if you can identify the signature to that paper.

A. I know the signature quite well. It is by Mr. W. P. Duncan, vice president of the bank, and Mr. J. E. Lynn, cashier.

Q. And you know that they were those officers at that time?

A. I do.

(The assignment dated October 1, 1929, was there-

upon offered and received in evidence as petitioner's exhibit No. 12.)

(The witness thereupon identified his signature on an assignment of mortgage from Moline Properties, Inc., to the Bank of Bay Biscayne, dated October 1, 1929, which assignment was offered and received in evidence as petitioner's exhibit No. 13.)

Q. (BY MR. FELIX) Judge Thompson, I now direct your attention to the minute which I read a while ago by which the corporation authorized the purchase of your $43,000 note from the Bank of Bay Biscayne and will ask you whether that note was secured by any real estate.

A. Yes, it was.

The assignments of mortgage introduced into evidence as Petitioner's Exhibits 12 and 13 cover the property that secured the payment of that note.

Q. Now, I direct your attention to this minute dated 10 o'clock October the first, 1929, and assignment of the mortgage from the bank to Moline Properties, dated 11 o'clock on the same day, October the first, 1929, and a reassignment back to the Bank of the same mortgage on the same day at 11:30 a. m., and ask you whether or not, so far as you know, any money was passed in this transaction.

A. Couldn't have been, because Moline Properties had no account and never had and never issued a check, since it has been organized. That is just some bank juggling. It caused them all to be indicted.

May I explain, Mr. Felix, I signed whatever the bank sent over there. I was obligated to the bank.

If they drew a paper and sent it over there I signed it. I never asked any questions. I was not in a position to ask questions. It related to Moline Properties. They had a voting trust to do as they pleased, and I had confidence in everything that the bank was doing. But that is a pure bogus piece of shenanigan.

The Block 77 property has been sold. Moline Properties doesn't hold title to it. It was sold in three separate parcels, Mr. Felix. I don't recall the exact dates. The first sale was made in 1934. The second sale was made in 1935, and the last sale disposing of all of the property, was in 1936, the early part of '36. I received the money from those sales. I deposited it in my bank account. I recognize the book you hand me as my passbook, I believe you call them, at the First National Bank of Miami, Florida. The entry on February 15, 1936, of $29,832.81 was the net amount coming to me from the sale of this property at the Beach, the remaining portion of Lot 77, less this National Investment Company mortgage and some taxes and things that I had to clear up. This book shows this to be the account of Uly O. Thompson. The 1934 sale of the first piece was reported for income tax purposes by Moline Properties. As I recall, there was no taxable taxes due on that, whether reported by me or the corporation. I didn't think anything about it, the question of taxes. The 1935 return or sale to the Collins Avenue Improvement Corporation was reported by the corporation. The 1936 sale was reported by me as an individual.

I was on the bench at the time. I was one of the Circuit Judges here in this county, was on the bench, and we were exceedingly busy. I never made out an income tax return in my life. I knew nothing about income tax law and didn't undertake to know. I had engaged Mr. Smethurst, auditor, of the city here, to make my returns. He came to my office in the Court-

house. My secretary handed him a closing statement on the first sale that was made in 1934, a typewritten copy of the closing statement that I always kept.

The same thing happened in the sale of 1935. I didn't even discuss the matter with Mr. Smethurst. He made up the returns and sent them down to my office and I signed them, I think for the corporation. I think I am the one that signed them as president of the corporation. Subsequent to the return in 1935 there was some taxes due there, and Mr. Smethurst contacted me one day and told me that some court or the Department had made a ruling that he was convinced that entitled me to make individual return of that; in the meantime he had found out the character of the corporation and that if it was a pure receptable to hold title to this property that I had a right to file an individual return, and that I ought to file a claim for refund or for the recapture of the taxes that I had paid in '35. That was subsequently done. The '36 sale came along, and, acting upon the advice of my auditor, we prepared and filed a personal return for Uly O. Thompson, rather than a corporate return.

The 1934, 1935 and 1936 income tax returns and 1935 amended income tax return of the petitioner were offered and received in evidence as Respondent's exhibits A, B, C and D. The 1935 and 1936 income tax returns of Uly O. Thompson were offered and received in evidence as Respondent's Exhibits E and F.)

I was a Circuit Judge of this Circuit up to about the middle of 1935, when the office was abolished by an act of the legislature. I went back into the practice, I think, in December, 1936. The time between July '35, when the recircuiting act of the state abolished the office that I held, and December 1936, I was engaged in some litigation with the Attorney General as to the constitutionality of the Act. I was a Judge of the Circuit Court all during the year 1934. If I had any income

at all aside from my salary it was nominal. Whatever it was, it was reported. I am a married man and was married that time. I understood my salary was exempt. In 1934 my income aside from salary must have been very limited, if any. I have no independent recollection of it. I should think it was very much less than a thousand dollars. I have no independent recollection. The State of Florida, state office, paid my salary as a judge for that year.

On cross examination the witness testified as follows:

> Q. (BY MR. VAN HAAFTEN) Mr. Thompson, I show you Petitioner's Exhibit 5 and refer you to the 15th paragraph of that document. Was that note ever paid?
>
> A. Yes, the $6750 note. It was liquidated. After the bank closed it was liquidated for some nominal sum.

It was settled for some nominal sum with the liquidator. I previously testified that in my opinion the stock and these minute books and things were never returned to me until the mortgages at the Beach were likewise paid. After the execution of this trust agreement the deeds were actually delivered to the Moline Proprties, and the deed that they caused me to deliver called for Moline Properties to assume and agree to pay the debt. It might have been almost a simultaneous transaction, but this voting trust was something that went along with the corporation. I can not off hand recall the exact date when the matter of the payment of the note was settled. I settled these matters with the liquidaors as fast as I could get hold of money to pay them, and that note was one of them and I paid it. I don't think the Bank of Bay Biscayne liquidator has been discharged. If he has, I don't know about it.

Q. Referring to Petitioner's Exhibit No. 1, which has been identified as the minute book of the corporation, I refer you to the last paragraph of the minutes. Would you read that,

THE WITNESS: "Mr. Sterne reported"—might I say that Mr. Sterne was vice president of the bank of Bay Biscayne, and he is the one who held the voting trust, "Mr. Sterne reported the loan of this company to Bank of Bay Biscayne. $6750 is still unpaid. But that this company had a deal on through condemnation proceedings for part of Beach lot, and if this goes through the company will have money to liquidate the note."

The condemnation proceedings took place. The company received $6500, as I recall, and I don't think that the Bank of Bay Biscayne got a nickel out of it. My recollection is that the Clerk of this Court handed me, as president of Moline Properties, a check, and it was applied in our opinion to the—sent over to the Beach bank. I don't know. That money was received and turned over to one of my creditors, either the Bank of Bay Biscayne or the other one over at the Beach. I don't want to be bound with the reading of that minute. I had nothing to do with drawing it up, but I know where the money went.

The Moline Properties has no books or records at all except what the bank kept. I have nominal records that I always keep in my office. I used to keep a complete set of books, but my business does not warrant it and I don't keep them any more, and I am not a bookkeeper. In 1935, 1936 and 1937 I kept records that were satisfactory to me, that I could explain anything you want to ask about.

I said that during the year 1934 my recollection was that if I had any independent income aside from a salary, that it would be less than a thousand dollars. I

don't recall any. I might have had a thousand dollars and might have had more. But I wouldn't undertake to—my reports ought to be the best evidence of it; I mean what I declared. I think it was during 1933 or some time subsequent to that time that the amount that was due and owing with respect to the $6,750 was paid. Certainly it was not before 1933, in my opinion.

Now, may I say this, about income: I owned a lot of property on the south side here, and previously I testified that I thought it had little value. I would like to say this, that the property was subsequently sold and I received some income from it. It was all in my name. Now, when the property was sold I don't know, but I did receive income from those sales as they were made. Most of it went to the payment of taxes. And my observation about the property not being worth anything then, that some twenty odd thousands of dollars and taxes had accumulated against the property, and I was not in position to borrow money to pay the taxes. The City of Miami and I think the State went on a project in after years of compromising these taxes, and in that way only was I able to get anything out of any of the properties.

Q. Without getting down to any particular detail, about how long would you say that you had paid off—or that this money was paid off—before the loan was made or the transaction was made with National Investment? Would it be a month or six months or a year?

A. I think the loan to the National Investment was made in 1933, as I recall. The papers, I believe, are introduced in evidence, and I think that this debt was paid off in the year 1933.

I don't have any independent recollection definitely when it was paid. My testimony, as I recall it was that it occurred some time before that time. Foreclosure pro-

ceedings were somewhat cumbersome, and the bank might have anticipated. I don't know what they had in mind. They might have had some difficulty in foreclosing. But they wanted to get the property, and it was solely for the benefit of the bank—get the property of that Block 77, which was a more or less—had potential values, if we could get restriction on it—in the hands of the bank, so that they could handle it as they saw fit; and they proceeded to do that. If they got an opportunity to sell it, it was my understanding that they could sell the stock of the corporation and pass title over to anyone that would pay them enough for it. If they required my consent it would have been a very easy matter to have had it, I think, although there was some understanding that they were not going to foreclose. I was not trying to delay the bank or defeat the bank in the collection of its moneys. I permitted them to form this corporation at their suggestion and because they wanted it that way. I was always a stockholder of this corporation. No one else ever owned any interest at all in the corporation except Uly O. Thompson.

Q. Now, when checks were made to the Moline Properties at any time were you ever asked to pass a resolution in order to protect the bank in cashing those checks?

A Yes, sir. My recollection is that I undertook to furnish the Department when this matter first came up with that information. When this transaction was closed, the purchasers—the title was in the name of Moline Properties, and Mr. Simms is a business man of extensive experience, and he refused to make a check except payable to Moline Properties. I was president of Moline Properties. I endorsed the check and took it downstairs in the First National Bank to deposit it to my account, and Mr. Oliver, the executive president of the bank, refused to accept it. He said they were not permitted to accept these deposits. He said that, while

he knew it was my corporation, the transaction had been through the bank or through the firm of Evans and Mershon upstairs in the bank; that I would have to get a resolution from the other stockholders of the corporation saying that it was my money, and my brother and my secretary signed that resolution. I drew up something to satisfy the bank. Then I took the check in there and deposited it.

The company is still in existence unless it has been dissolved by operation of law, proclamation of the Governor of the State. If you want to call a corporation in existence—it has no assets, and I have never made any returns of capital stock since it paid any state stock taxes, since the sale was made. The 1935 tax of this corproation has not been fully paid, because I was advised that I was entitled to recapture what I had paid and file whatever you call it, a petition, to recapture the tax. Since that time I have not paid any. I have no independent recollection of income of rents of a thousand dollars shown on the 1934 income tax return. Mr. Smethhurst has the information, I am sure. He made the return. I wish I could tell you, but I can't. I don't believe I have ever read the charter of the corporation. It is in evidence. If it is not in evidence, I will be glad to get it for you. I should imagine, though, it permitted the corporation to engage in all kinds of business.

Q. (By MR. VAN HAAFTEN) I will hand you the charter, what purports to be the charter of the corporation, and ask you in a general way what this corporation was incorporated for.

A. Everything under the sun—build streets, roads, improve houses, buy, sell, or own, control, develop, improve, pledge, mortgage, lease, sell, or otherwise acquire, handle, hold, and dispose of real estate and personal property—whatnot—practically everything in the world. Its general powers—rather specific and general powers, and specific powers

were largely enumerated. I never saw the charter until after all of these matters were settled up. I did not subscribe to it that I know of.

Q. In order to clarify the record, I understood you to say on direct examination that you made the loan, or you rather acquired $5500, which was upon or from the National Investment Holdings Company—that you did that personally?

A. That I borrowed the money? Yes, I did.

Q. I refer to the minutes of July 15, 1933, and ask you to read those and see if that changes your testimony on that point.

A. I am familiar with the minute that you refer to, and that is a minute that I wrote up after this loan was made and the mortgage was recorded and everything, and sent it to the National Investors just to complete their records, and after this book was returned to me and I caused that to be put in there. That minute is a formal authorization of Moline Properties to negotiate the loan.

Q That indicates, though, that the loan was made by Moline Properties?

A. The minute does, yes sir, but the checks were payable to me, and they are in evidence. That was security that I offered these people and told them I would give them, and I drew that minute without their suggestion. I was attorney for them, and I felt that they ought to have it.

I owned considerable property in my own name at about this time. It was encumbered. Some of it was improved property, consisting of some farm lands in Georgia, and the rest of it was unimproved property consisting of lots I testified about, and my home at the Beach. The only way that I could estimate my net equity in

my personal property aside from my home during these years—and I think if you are familiar with conditions here at the time—would be what you afterwards actually sold it for and got out of it. It would be a pure hazard for any human being to estimate what the equity was in any property at that time. I afterwards compromised tax matters on the property down here and received several thousand dollars out of the sale of those properties. But the taxes upon an estate were in excess of the value of the property on some of it, because I know those appraisals were furnished by reputable realtors here in the city and liquidator of the bank before the bank would settle with me. There were three sales involved in the division of this Block 77.

I specifically made the return in 1936 as an individual return for the purpose of saving money. I was advised that I had a right to do it. And I so explained on the income tax return. I wouldn't sign it until Mr. Smethurst put that on there. Probably he suggested it. Anyway, it went on. I owned the corporation, if it was a corporation. No one ever owned any interest in it except me.

Q. Let me ask a question as to the payment of the 1935 corporation tax. I am not sure about the matter. Do you know whether or not the question of your filing these other amended returns and your personal returns which were filed, I believe, in 1937—some of them were filed in '37—whether that was caused by the effort of the Internal Revenue Bureau to collect the unpaid balance of the Moline Properties tax?

A. I really have no information at all about it. Whatever returns were filed—I would have filed a dozen returns if Mr. Smethurst had told me to. He was handling those matters for me. I simply filed whatever Mr. Smethurst advised me was necessary or proper to file. I think Mr. Smethurst could explain your question, I wish I could.

On redirect examination the witness testified as follows:

At the date I got back the corporation from the bank, the suit for removal of restrictions was still pending. My recollection is it was settled some year or two afterwards. It went to the Supreme Court two or three times, and I finally won it, and I think that it was shortly before the Supreme Court handed down its final decision, in my opinion shortly before, I sold the property to Mr. Simms, and I think that sale was in the early part of 1936. The corporation has not entered into any activity since the sale of the property. Could not. Didn't have any money. Neither of the other two stockholders of record of the corporation received any of the money which was paid for the purchase of Block 77. I received all of it, at all times; and I paid all expenses.

> Q. Now, Judge Thompson, will you tell me when you paid the bank and received the stock book and the corporate records back from the bank—will you tell me why you didn't dissolve that corporation?
>
> A. Couldn't dissolve it. It would have been a violation of law to attempt to dissolve it. You can't dissolve a corporation in Florida that owes a debt. The law requires you, if you desire to dissolve a corporation, to file a petition in court citing who the stockholders are and all the stockholders agree to it and the corporation owes no debts; and this corporation owed $40,000 to that liquidator over there.

After that it owed this other, and I couldn't get the money from the National Investors until this mortgage was paid on there. The title was there and stayed there.

May I explain something about that dissolution? I think that is something that concerns the hearing. After

the property was sold, after I sold the last piece of property, there was the shell of this corporation. I didn't dissolve it simply because under operation of law it would automatically dissolve. It had sold all of its assets. All of the stock had previously been issued. It sold all of its assets, and the corporation had no stock to sell and couldn't raise money for any purpose; and the Supreme Court of this state has held, I think quite repeatedly, that where all of the assets of the corporation are sold the corporation is dissolved. It would have to be revived some way or another.

On cross-examination the witness further testified as follows:

My recollection is that the condemnation suit, which was brought some time before, was brought in the name of the—the city of Miami Beach brought that. The corporation didn't do that. I think it was brought against the corporation. That is my recollection. I think the corporation was a party to both suits.

BENJAMIN M. SMETHURST, a witness on behalf of the petitioner, was duly sworn and testified as follows:

I am a public accountant and have been practicing accountancy since 1921. I prepared them the several corporate and individual returns heretofore introduced into evidence by the respondent and which you now hand me. I was associated with a lawyer in my business at this time in the early part of 1935, and he came to my office, I can't remember whether it was just before the 15th of March or just before the 15th of April, and told me that Judge Thompson had a corporation that had to have an income tax return prepared. My notation on my pencil copy of the return is that I was down there on the 13th day of April, which indicates that that year, 1934, was a blanket extension year, or that Judge Thompson had received a 30-day extension for filing.

And on the 13th day of April I went to Judge Thompson's chambers. I didn't even see the Judge; I saw his secretary. Judge Thompson at that time was on the bench. I don't know whether he was at the very moment conducting a hearing or not. But I went to see his secretary, and she handed me a closing statement, and I sat down with her for possibly five minutes and returned to my office and prepared this income tax return for the corporation for the calendar year 1934. It indicates it was delivered back to him on the 15th day of April, 1934, for signature.

In 1935 this return was prepared on the 16th day of March, 1935, which indicates that March 15 must have been a Sunday and was sent back down to him after typing on the 15th of March; and the same thing occurred in 1935 as had occurred in 1934, to the best of my knowledge. I don't believe that I saw Judge Thompson. I might have in 1935. I know I did not in '34.

In the early part of '36, some time before the summer, either in connection with working on another tax case or something else, the case of Stuart Forshay was called to my attention, which was a Board of Tax Appeals case having to do with dummy corporations. I had learned a little bit more about Moline Properties, and I went to Judge Thompson and I said, "Judge Thompson, in my opinion those two sales just never have been recorded by the corporation. Moline Properties is just as much a dummy corporation as anything could be." And I suggested to him that we write a letter to the Commissioner and state the facts to the Commissioner of Internal Revenue and ask for an opinion from the Commissioner of Internal Revenue as to whether or not we had properly reported them in the corporation return, or they should have been reported by Judge Thompson. I dictated that letter myself. I have a copy of it. I did not sign it, however, I had no power of attorney, and the—I received a reply from the Commissioner. I have the original reply.

Q. Will you let me have the original reply and the carbon copy of the original letter ?

A. (The witness handed documents to counsel.)

MR. FELIX: I now offer into evidence as Petitioner's Exhibit No. 14 the letters just handed me by the witness.

MR. VAN HAAFTEN: I object, Your Honor, to the introduction of these documents. It is immaterial what the Commissioner wrote to this man at that particular time in response to this letter. The notice of deficiency shows the position of the Commissioner.

THE COURT: Let me see it.

(The documents were handed to the Court.)

MR. FELIX: Might I say a word, Your Honor, that I think will save time?

THE COURT: Very well.

MR. FELIX: We are not introducing these letters with any idea of any effect they might have on the merits of the case. We are simply introducing them to corroborate the circumstances under which the corporation ceased making returns and the individual stockholder began making returns. It is merely corroborative of the circumstances under which this change was made, corroborating this witness' testimony, and not having any relation to the merits of the case.

THE COURT: Well, I suppose they may go in for that reason. There is no opinion expressed.

MR. FELIX: No opinion expressed in letter.

THE COURT: Let it be received.

(The documents referred to were marked "Petitioner's Exhibit 14".)

I heard Mr. Thompson testify and I heard Government counsel ask him in regard to certain rents.

Q. Do you know of your own knowledge what those rents represent?

A. I may have the 1934—(document was handed to the witness) my pencil copy? Where did it go to? The thousand dollar rent is also on our typewritten statement marked "Lease". I happen to know of my own knowldcge that that was the rental either one or parts of two lots which I believe was used for parking purposes.

Q. Were those lots a part of this Block 77?

A. To the best of my knowledge, they were, yes.

On cross examination the witness testified as follows:

I made out the amended income tax return for the year 1935 in 1938. It was sworn to on December second, 1938. I do not know whether or not the reason this came to my attention was because the deputy collector was endeavoring to collect some of the original 1935 tax. The reason that I brought it to the Judge's attention, as I testified a few minutes ago, was the fact that this Forshay case had been brought to my attention, either in connection with some other tax matter or in reading a tax service or getting a letter. I get the Alexander Tax News Letter. I don't know just how that was brought to my attention, but, as a matter of fact, I didn't know, and didn't know for a long time, that the 1935 tax had not been paid. This was 1938 when I filed this amended 1935 return. But in 1935 the return

was due in March of 1937. No corporation return was filed for 1936, other than an inactive return.

Whereupon both parties rested and the proceeding was submitted to the Board Member for decision.

The foregoing statement, together with the exhibits referred to therein, constitutes all of the material evidence adduced at the hearing before the United States Board of Tax Appeals and the same is hereby approved by the undersigned.

(Signed) J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Petitioner on Review.

Attorney for Respondent on Review.

Approved and ordered filed March 28, 1942.

(S) C. R. ARUNDELL,
Member, United States Board of Tax Appeals.

CERTIFICATE OF MAILING

The undersigned, counsel for petitioner on review, hereby certifies that on the 20th day of March, 1942, a copy of the foregoing document entitled "Statement of Evidence" was mailed to Douglas D. Felix, Esq., Congress Building, Miami, Florida, as counsel for respondent on review.

Dated this 20th day of March, 1942.

CHAS. E. LOWERY,
Special Attorney,
Bureau of Internal Revenue.

United States Board of Tax Appeals

Received

Mar 27 1942

Filed

Mar 27 1942

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner on Review, v. MOLINE PROPERTIES, INC., Respondent on Review.	B. T. A. Docket No. 103862

NOTICE OF LODGING STATEMENT OF EVIDENCE

To: Douglas D. Felix, Esq.,
Congress Building,
Miami, Florida.

You are hereby notified that the Commissioner of Internal Revenue, the petitioner on review, did, on the 20th day of March, 1942, lodge with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a statement of evidence in the above-entitled cause. A copy of the statement of evidence as lodged is hereto attached and served upon you.

Dated this 20th day of March, 1942.

(Signed) J. P. WENCHEL,
RLW
Chief Counsel,
Bureau of Internal Revenue.

Service of the foregoing notice, together with a copy of the statement of evidence mentioned therein, is hereby acknowledged this 24 day of March, 1942, and agreed to.

(Sgd.) DOUGLAS D. FELIX,
Counsel for Respondent on Review.

U. S. Board of Tax Appeals

Div. 7, Docket 103862

Admitted in Evidence

Jan. 8, 1941

Petitioner's Exhibit 1

COPY OF CHARTER

We, the undersigned, do hereby associate ourselves together for the purpose of becoming a corporation under the laws of the State of Florida, by and under the provisions of the Statutes of said State providing for the formation, rights, privileges and immunities of a corporation for profit.

ARTICLE I.

The name of this corporation shall be Moline Properties, Inc. (hereinafter referred to as the "Corporation").

ARTICLE II.

NATURE OF THE BUSINESS

The general nature of the business and the objects and purposes proposed to be transacted, promoted or

carried on are to do any and all of the things hereinafter mentioned, as fully and to the same extent as natural persons could do, viz:

(a) To buy, own, hold, control, develop, improve, pledge, mortgage, lease, sell or otherwise acquire, handle, hold and dispose of real estate and personal property, or any interest therein: to construct, equip, repair and improve houses, buildings, streets, sidewalks, reservoirs, waterworks, sewers, docks, fills and other structures and improvements of any kind or character whatsoever; to lay off, plat and subdivide lands into lots and blocks and to dedicate parks, streets, highways and alleyways thereon.

(b) Generally to conduct a real estate business and to acquire and deal in real estate in such manner as natural persons might or could do.

(c) To acquire by purchase, subscription or otherwise and to hold for investment, and to own, hold, sell, vote and handle shares of stock in other corporations.

(d) To guarantee, to acquire by purchase or otherwise, any bonds, securities, or evidences of indebtedness issued or created by any other corporation or by any State or Government, domestic or foreign, and to exercise any and all of the rights, powers and privileges of ownership which a natural person might do; to aid by loan, subsidy, guaranty, or in any other manner whatsoever so far as the same may be permitted by law, any corporation whose stocks, bonds, securities or other obligations are or may be in any manner and at any time owned or held or guaranteed and to do any and all other acts or things for the preservation, protection, improvement or enhancement in value of such stocks, bonds, securities or obligations.

(e) To borrow money and contract debts when necessary for the transaction of its business for the exercise of its corporate rights, privileges or franchises, or for

any other lawful purpose of its incorporation; to issue bonds, promissory notes, bills of exchange, debentures, and other obligations and evidences of indebtedness payable at a specified time or times, or payable upon the happening of a specified event or events secured or unsecured, from time to time, for moneys borrowed, or in payment for property acquired, or for any of the other objects of its business; to secure the same by mortgage or mortgages, or deed or deeds of trust, or pledge or other lien upon any or all of the property, rights, privileges or franchises of the Corporation, wheresoever situated, acquired or to be acquired; and to confer upon the holders of any debentures, bonds or other evidences of indebtedness of the Corporation, secured or unsecured, the right to convert the principal thereof into any preferred and/or common stock of the Corporation, now or hereafter authorized, upon such terms and conditions as shall be fixed by the Board of Directors; to sell, pledge, or otherwise dispose of any or all debentures or other bonds, notes and other obligations in such manner and upon such terms as the Board of Directors may deem judicious.

(f) To manufacture, purchase or otherwise acquire, to hold or own, to mortgage, sell, pledge, assign, transfer or otherwise dispose of, and to invest, trade and deal in goods, wares and merchandise and property of every class and description necessary or incidental in carrying out the business of the Corporation.

(g) To have one or more offices, conduct its business and promote its objects within and without the State of Florida, in other states, the District of Columbia, the territories, possessions and dependencies, of the United States and in foreign countries, without restriction as to place or amount.

(h) To do all and everything necessary and proper for the accomplishment of any of the purposes or the attaining of any of the objects or the furtherance of any

of the powers enumerated in this certificate of incorporation or any amendment thereof, necessary or incidental to the protection and benefit of the Corporation, as principal, agent, director, or otherwise, and in general, either alone or in association with other corporations, firms or individuals, to carry on any lawful business necessary or incidental to the accomplishment of the purposes or the attainment of the objects or the furtherance of such purposes or objects of the Corporation, whether or not such business is similar in nature to the purposes and objects set forth in this certificate of incorporation or any amendment thereof.

(i) The enumeration herein of the powers, objects and purposes of the Corporation shall not be deemed to exclude by inference any powers, objects or purposes which the Corporation is empowered to exercise, whether expressly by force of the General Corporation Laws of the State of Florida, or impliedly by the reasonable construction of the said laws.

ARTICLE III.

CAPITAL STOCK

The amount of the total authorized capital stock of the Corporation shall be twenty-five (25) shares of common stock, without nominal or par value. The whole or any part of the capital stock of said corporation shall be payable in lawful money of the United States of America, or in property, labor or services at a just valuation to be fixed by the directors. Property or labor may also be purchased with the capital stock at such valuation as shall be fixed by the directors.

ARTICLE IV.

AMOUNT OF CAPITAL WITH WHICH TO BEGIN BUSINESS OF CORPORATION

The amount of capital with which the Corporation

shall begin business shall be Five Hundred Dollars ($500.00).

ARTICLE V.

CORPORATE EXISTENCE

The Corporation shall have perpetual existence.

ARTICLE VI.

PRINCIPAL OFFICE AND RESIDENT AGENT

The principal place of business of said Corporation is to be located in Miami, Dade County, Florida, with the privilege, however, of having branch offices and places of business at any other place or places within or without the State of Florida, or in foreign countries. R. F. Burdine of Miami, Florida, is hereby designated as Resident Agent of the Corporation, as required by law.

ARTICLE VII.

NUMBER OF DIRECTORS

The affairs of the Corporation shall be conducted by a board of not less than three nor more than five directors who need not be stockholders.

ARTICLE VIII.

DIRECTORS

The names and post office addresses of the first board of directors of the Corporation, who subject to the provisions of this certificate of incorporation and the by-laws and General Corporation law of the State of Florida, shall hold office for the first year of the Corporation's existence, or until their successors are elected and have qualified, are as follows:

Name Post Office Addresses

Thelma Cain,
Bank of Bay Biscayne Bldg., Miami, Florida;
Lurline Jackson,
Bank of Bay Biscayne Bldg., Miami, Florida;
Agnes Protho,
Bank of Bay Biscayne Bldg., Miami, Florida.

ARTICLE IX.

NAMES AND POST OFFICE ADDRESSES OF SUBSCRIBERS

The names and post office addresses of each subscriber of this certificate of incorporation, and a statement of the number of shares of stock which they agree to take are as follows:

Name.	Post Office Addresses	No. of Shares
Thelma Cain,	Bank of Bay Biscayne Building, Miami, Florida.	3
Lurline Jackson,	Bank of Bay Biscayne Building, Miami, Florida.	1
Agnes Protho,	Bank of Bay Biscayne Building, Miami, Florida.	1

ARTICLE X.

SPECIAL CHARTER PROVISIONS

The original incorporators of the Corporation shall have the right upon its organization, to assign and deliver their subscriptions of stock as set forth in Article IX hereof to any other persons, or to firms, or corpora-

tions who may hereafter become subscribers to the capital stock of the Corporation, who, upon acceptance of such assignment, shall stand in lieu of the original incorporators, and assume and carry out all the rights, liabilities and duties entailed by said subscription, subject to the laws of the State of Florida and the execution of the necessary instrument of assignment.

The number of directors of the Corporation may be increased or decreased to not less than three (3) as may be provided by the bylaws. The bylaws may prescribe the number of directors necessary to constitute a quorum of the Board of Directors, which number may be less than the majority of the whole board of directors. In case of any vacancy in the board of directors, through death, resignation, disqualification. or other cause, such vacancy shall be filled for the unexpired term by the affirmative vote of a majority of the remaining directors. In case of any increase of the number of directors, the additional directors shall be elected by the affirmative vote of a majority of the directors then in office.

In furtherance and not in limitation of the powers conferred by statute, the Board of Directors is expressly authorized:

(a) Subject to the bylaws, if any, adopted by the stockholders, to make, alter, amend or repeal the bylaws of the Corporation.

(b) If the bylaws so provide, to designate by resolution two or more of their number to constitute an Executive Committee, which Committee to the extent provided in the resolution or in the bylaws of the Corporation, shall have and may exercise any or all of the powers of the Board of Directors in the management of the business, affairs and property of the Corporation, during the intervals between the meetings of the board of directors, so far as may be permitted by law.

(c) From time to time to determine whether and to

what extent and at what times and places and under what conditions and regulations the accounts and books of the Corporation (other than the stock ledger) or any of them shall be open to inspection of stockholders and no stockholder shall have any right of inspecting any account, book or document of the corporation except as conferred by statute, unless authorized by a resolution of the stockholders or directors.

The corporation may at any meeting of its Board of Directors, sell, lease or exchange all of its property and assets, including its good will and its corporate franchises, or any property or assets essential to its corporate business, upon such terms and conditions, either for cash, for the securities of any other corporation or corporations, or for such other consideration as its Board of directors may deem expedient and for the best interest of the Corporation when and as authorized by the affirmative vote of the holders of record of at least two-thirds of the stock of each class issued and outstanding given at a stockholders meeting duly called for that purpose, or when authorized by the written consent of the holders of record of at least two-thirds of the stock of each class issued and outstanding.

Both stockholders and directors shall have power, if the bylaws so provide, to hold their metings either within or without the State of Florida, to have one or more offices and to keep the books of the Corporation, subject to the provisions of the laws of the State of Florida, within or without the State of Florida, at such places as may from time to time be designated by the Board of directors.

No contract or other transaction between the Corporation and any other corporation in the absence of fraud, shall be affected or invalidated by the fact that any one or more of the directors of the Corporation is or are interested in, or is a director or officer or are directors or officers of such other corporation, and any director or directors, individually or jointly may be a

party or parties to, or may be interested in, any such contract or transaction of the Corporation or in which the Corporation is interested and no contract, act or transaction of the Corporation with any person or persons, firm or corporation in the absence of fraud, shall be affected or invalidated by the fact that any director or directors of the Corporation is a party or are parties to or interested in such contract, act or transaction, or in any way connected with such person or persons, firm or corporation, and each and every person who may become a director of the Corporation is hereby relieved from any liability that might otherwise exist from thus contracting with the corporation for the benefit of himself or any firm, association or corporation in which he may be in anywise interested. Any director of the corporation may vote upon any contract or other transaction between the Corporation and any subsidiary or controlled company without regard to the fact that he is also a director of such subsidiary or controlled company.

IN WITNESS WHEREOF, the undersigned have made and subscribed this certificate of incorporation, at Miami, Florida, for the uses and purposes aforesaid, on the 24th day of May, A. D. 1928.

THELMA CAIN (Seal)
LURLINE JACKSON (Seal)
AGNES PROTHO (Seal)

STATE OF FLORIDA,)
COUNTY OF DADE.)

Personally appeared before me, the undersigned authority, THELMA CAIN, LURLINE JACKSON and AGNES PROTHO, each of whom is to me well known and known to me to be the persons described in and who executed the foregoing certificate of incorporation, and each of them acknowledged before me, according to

law, that they made and subscribed the same for the uses and purposes therein mentioned and set forth.

WITNESS my hand and official seal, this 24th day of May, A. D. 1928.

NOLIE C. MURRAY

Notary Public, State of Florida, at large.

My Commission Expires: July 2, 1929.

(N. P. Seal)

STATE OF FLORIDA

OFFICE OF SECRETARY OF STATE

I, H. CLAY CRAWFORD, Secretary of State of the State of Florida, do hereby certfiy that the above and foregoing is a true and correct copy of Certificate of Incorporation of MOLINE PROPERTIES, INC., a corporation organized and existing under the laws of the State of Florida, said certificate of incorporation having been filed in the office of the Secretary of State of the State of Florida, on May 25, 1928, as shown by the records of this office.

GIVEN under my hand and the Great Seal of the State of Florida, at Tallahassee, the Capital, this the twenty-eighth day of May, A. D. 1928.

H. CLAY CRAWFORD,
Secretary of State.

(Great Seal of the
State of Florida)

October 1st, 1929.

10:00 o'clock, A. M.

MOLINE PROPERTIES, INC.

MINUTES OF DIRECTORS MEETING

The Directors of Moline Properties, Inc., met in the Office of Uly O. Thompson, on the fifth floor of the Bank of Bay Biscayne Building, at ten o'clock, A. M., on Tuesday, October 1st, 1929.

There were present:

R. K. Mixson

A. E. Bolt

Edwin Sterne

Mr. Sterne acted as Chairman of the meeting and Mr. Bolt as Secretary thereof.

Thereupon, the President Uly O. Thompson announced to the meeting that the Bank of Bay Biscayne had offered to sell to Moline Properties, Inc., a certain note of Uly O. Thompson, in the principal sum of $43,000.00 and accrued interest of $9703.14, which is secured to the satisfaction of the Board, the sale being made at par with accrued interest.

Thereupon the following resolution was adopted by unanimous vote:

"BE IT RESOLVED: That this Company do purchase said note and in order to obtain the proper funds therefor, that they borrow the moneys from the Bank of Bay Biscayne, giving its note therefor due on or before six (6) months after date, and pledging as collateral the said note and mortgage of Uly O. Thompson, which

it is purchasing together with Twenty-five shares of Capital Stock of Moline Properties, Inc., which is the entire amount issued, and which is already pledged to said bank."

There being no further business, the meeting adjourned.

EDWIN STERNE
Chairman

AGNES E. BOLT
Secretary.

Hold-No Time price

FORM 1004 MUST BE FILED EVEN THOUGH RETURN

Form 1120
TREASURY DEPARTMENT
Internal Revenue Service

Auditor's Stamp

CORPORATION INCOME AND EXCESS-PROFITS TAX RETURN

For Calendar Year 1934

Page 1 of Return

FIELD

or Fiscal Year beginning ..... 1934, and ended .....

Serial Number 855090

District Florida

PRINT PLAINLY CORPORATION'S NAME AND BUSINESS ADDRESS

MOLINK PROPERTIES, INC.
(Name)

1512 Collins Avenue
(Street and number)

Miami Beach, Florida
(Post office and State)

It is Essential, Except Where Otherwise Provided in the Instructions, That This Form be Completely Filled In Irrespective of Any Statements, Schedules, or Reports Submitted Herewith

Date of Incorporation 1928

Under the Laws of what State or Country Florida

The corporation's Books are in Care of

Located at

Kind of Business (in detail)

Is This a Consolidated Return of Railroad Corporations?

Is This a Consolidated State Amount of Income Included

Form 851 of the Revenue Act of 1934?

SECTION 1—GROSS INCOME

APR 24

DEDUCTIONS

APR 15

Under the Laws of what State or Country Florida

RECEIVED
APR 24

SECTION GROSS INCOME

DEDUCTIONS

COMPUTATION OF TAX

Loss

Note

SCHEDULE K—BALANCE SHEETS (See Instruction 5 (d))

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Items	Beginning of Taxable Year		End of Taxable Year	
	Amount	Total	Amount	Total
ASSETS				
	$		$	

SCHEDULE [illegible] SURPLUS

1. Net income from Item 28, page 1 of this return									
2. Nonallowable deductions:									
(a) Interest on obligations of the State, Territory, or any political subdivision thereof, or the District of Columbia, or United States possessions									
(b) Interest on obligations of the United States (except interest to [illegible] obligations as reported in Schedule J (a))									
(c) Dividends deductible under Section 26 (p) of the Revenue Act of 1936									
(d) Proceeds of life insurance policies paid upon the death of the insured									
(e) Other items of nontaxable income (to be detailed):									
(1)									
(2)									
(3)									
3. Charges against reserve for bad debts, if Item 31, page 1 of return, is not an addition to a reserve									
4. Charges against reserve for encumbrances, etc. (to be detailed):									
(a)									
(b)									
(c)									
5. Total of Lines 1 to 4, inclusive	$								
6. Time from Line 14									
7. Net profit or loss for year as shown by books before any adjustments are made thereon. Line 1 minus Line 6 (if so, indicate)	$								
8. Surplus and undivided profits as shown by balance sheet at close of preceding taxable year									
9. Other credits to surplus (to be detailed):									
a									
b									
10. Total of Lines 7 to 9, inclusive	$								
11. Time from Line 17									
12. Surplus and undivided profits as shown by balance sheet at close of taxable year (Line 10 minus Line 11)	$								

[illegible]									
(a) Federal taxes on income (Section 23 (a), 23 (b), 23 (c), and 23 (d))									
(b) Special taxes and amounts [illegible]									
(c) Depreciation sustained during taxable year on property pledged									
(d) Depletion not [illegible]									
(e) Pensions and bonuses, additions, or betterments treated as expenses on the books									
(f) Replacements and renewals									
(g) Insurance premiums paid on the life of any officer or employee where the corporation is directly or indirectly a beneficiary									
(h) Interest on indebtedness incurred or continued to purchase or carry obligations or securities the interest upon which is wholly exempt from taxation									
(i) Additions to reserve for bad debts which are not deductible in Item 31, page 1 of return									
(j) Additions to reserve for encumbrances, etc. (to be detailed):									
(1)									
(2)									
(3)									
(k) Other nondeductible deductions (to be detailed):									
(1)									
(2)									
(3)									
16. Total of Line 15									
16A. Dividends paid during the taxable year (state whether cash, stock of the corporation, or other property)									
(a) Date paid [illegible]									
(b) Date paid [illegible]									
(c) Date paid [illegible]									
(d) Date paid [illegible]									
16A. Other deductions (to be detailed):									
(a)									
(b)									
(c)									
17. Total of Lines 15 and 16									

NET INCOME (OR DEFICIT) REPORTED IN RETURN FOR CALENDAR YEAR 1935 OR FISCAL YEAR 1936

1. Net income $ [illegible] 2. Net deficit $ [illegible]

NATURE OF BUSINESS

3. [illegible] the figure to indicate the industrial division in which the corporation's main income is derived, and describe its business fully:

Agriculture and related industries, including farming, nursery, or harvesting, mining, quarrying, including gas and oil wells, and other natural deposits

Milling and processing, including gas and oil [illegible] natural deposits

MANUFACTURING

Food and kindred products

Beverages, manufacturers of

Tobacco products, not [illegible] vegetables, preparation

Textiles and their products, except leather and clothing

Knit goods, yarns, thread, fabrics, and finishing of textiles, except hats and clothing

Clothing, men's, women's, children's, and [illegible] hats, caps, millinery, and [illegible] gloves

Shoes, other than rubber, except [illegible]

Leather and its finished products, except boots and shoes

Paper and its products; printing and publishing

Lumber and its products, except furniture

Furniture and finished lumber products

Brick, tile, and other clay products

Pottery, china, and other earthenware

Glass and glassware, including [illegible]

Cement, concrete, gypsum, and plaster products

Stone, quarrying and products not elsewhere classified

MANUFACTURING (continued)

Metal products and processes

Iron and steel; [illegible] of blast furnaces, rolling mills, foundries

Electrical machinery, equipment, and supplies

Motor vehicles, [illegible] & parts

Aircraft, [illegible] parts

Shipbuilding, [illegible] repairing, boat building, marine railways, [illegible] and [illegible] products

Railroad equipment

Machinery, not elsewhere classified, including [illegible] machinery and equipment

Machinery, electrical, and equipment

Machinery, not elsewhere classified

Machinery, other than [illegible] manufacturing, professional, scientific, and precision instruments, and [illegible]

Professional equipment, except for [illegible] devices, drafting machines, [illegible] machines, etc.

Office equipment

Metal working material and equipment

Hardware, tools, etc.

Precious metal products and processes

Other metals, products and processes

Miscellaneous manufacturing

Radios, [illegible] or parts

Musical, professional, and scientific instruments, optical goods, toys, games

Airplanes, airships, [illegible] parts

Construction—new structures, bridges, buildings, railroads, ships, excavating and [illegible] operations

Transportation—rail, water, aerial, motor, etc., [illegible] and facilities

Public utilities—electric light or power, gas (artificial or natural), pipe lines, telegraph, telephone, radio, water works, heat supply, [illegible]

AFFILIATIONS WITH OTHER CORPORATIONS

3. Is this a consolidated return? [illegible]

If so, give name of corporation which [illegible]

PRINCIPAL LINES OF BUSINESS

5. Did the corporation file a return [illegible]

Was the corporation in any way [illegible]

If the answer is yes, [illegible]

[illegible] gross sales or receipts [illegible]

If the answer is yes, [illegible]

BASIS OF RETURN

6. Is this return made on the [illegible]

If not, [illegible]

[illegible]

[illegible]

PREPARATION OF RETURN

8. Did any person or [illegible] this return, or [illegible] thereof, other than the officers or employees of the [illegible] actually prepare this return for the corporation? Yes

(2) ....

(3) ....

3. Charges against reserve for bad debts, if Item 21, page 1 of return, is not an addition to a reserve.

4. Charges against reserves for contingencies, etc. (to be detailed):

(a) ....

(b) ....

(c) ....

5. Total of Lines 1 to 4, inclusive $

6. Total from Line 14

7. Net profit or loss for year as shown by books, before any adjustments are made thereto (Line 5 minus Line 6) (if loss, so designate) $

8. Surplus and undivided profits as shown by balance sheet at close of preceding taxable year

9. Other credits to surplus (to be detailed):

(a)

(b)

10. Total of Lines 7 to 9, inclusive $

11. Total from Line 17

12. Surplus and undivided profits as shown by balance sheet at close of taxable year (Line 10 minus Line 11) $

taxable. $........

(d) Interest on indebtedness incurred or continued to purchase or carry obligations or securities the interest upon which is wholly exempt from taxation........

(e) Additions to reserve for bad debts which are not included in Item 21, page 1 of return........

(f) Additions to reserves for contingencies, etc. (to be detailed):

(1) ....

(2) ....

(3) ....

(g) Other unallowable deductions (to be detailed):

(1) ....

(2) ....

(3) ....

14. Total of Line 13

15. Dividends paid during the taxable year (state whether paid in cash, stock of the corporation, or other property):

(a) Date paid Character $

(b) Date paid Character

(c) Date paid Character

(d) Date paid Character

16. Other debits to surplus (to be detailed):

(a)

(b)

(c)

17. Total of Lines 15 and 16

NET INCOME (OR DEFICIT) REPORTED IN RETURN FOR CALENDAR YEAR 193 OR FISCAL YEAR 193

Net income $ or deficit $

NATURE OF BUSINESS

Check the boxes to indicate the business activity in which the corporation's main income is derived (see instructions).

Agriculture and related industries, including fishing, forestry, and harvesting; raising and processing	**MANUFACTURING** (continued)
Mining and quarrying, including gas and oil wells; leasing such properties	**Metal products and processes**
MANUFACTURING	Iron and steel products of blast furnaces, rolling mills, foundries
Food and kindred products	Locomotives and railroad equipment
Bakery and confectionery products	Motor vehicles, complete or parts
Canned products, dried fruit, vegetables, fish	Machinery, factory, used in producing food, leather, textile, paper, printing, rubber, etc.
Products from flour, feed	Machinery, agricultural and equipment
Packing-house products, meats and dairy products	Machinery, electrical and equipment
Sugar, beet, cane; candy, chewing gum, etc.	Machinery, other, building, construction, etc. and mining machinery and equipment
Other food products, bottled, ice cream, soft drinks	Household equipment, radio, furniture, refrigerators, sewing machines, washing machines, etc.
Beverages, soft drinks, mineral water	Office equipment
Brewing and distilling, malt, liquors, wines	Metal building material and equipment
Tobacco products	Hardware, tools, etc.
Textiles	Precious metal products and processes
Cotton goods, dress goods, etc.; napping, dyeing	Other metals, products and processes
Woolen and worsted goods, dress goods, etc.; wool pulling, scouring	**Miscellaneous manufacturing**
Silk and rayon goods, dress goods, throwsters, silk, etc.; spooling, warping	Radios, complete or parts
Carpets, floor coverings, tapestries, linoleum	Musical, professional, and scientific instruments, optical goods, small items
Other textiles, cord, felt, fur, linen, artificial leather, surgical textiles, etc.	Airplanes, airships, seaplanes, parts
Clothing, custom-made, factory-made, underwear, millinery, etc.	Construction—excavations, bridges, buildings, railroads, ships, equipping and installing systems
Knit goods, sweaters, hosiery, etc.	Transportation—rail, water, aerial, motor, etc., leasing such facilities
Leather boots, shoes, slippers, etc.	Public utilities—electric light or power, gas (artificial or natural), pipe lines, telegraph, telephone, radio, water-works, heat supply, toll bridges, etc., leasing such utilities
Other leather products, saddlery, harness, trunks, finishing, tanning	Storage—cold storage, grain elevators, warehouses, safe deposit vaults, etc.
Rubber tires and tubes	**Trade**
Other rubber goods, boots, shoes, hose, artificial rubber	Wholesale
Bone, celluloid and ivory products	Retail
Sawmill and planing mill products	Wholesale and retail
Other wood products—carriages, wagons, furniture, baskets, etc.	Commission
Paper, pulp and products	All other trade—repair service, garages for storing, film exchange, etc.
Printing, publishing, and allied industries	Service—professional, business, amusement, domestic, and all other
Petroleum and other mineral oil refining and products	**Finance**
Chemicals proper, acids, compounds, coal tar products, etc.	Banks—national, State, private, savings, joint stock land banks
Allied chemical substances, drugs, oils, soaps, etc.	Stock and bond brokers, investment bankers or brokers, investment trusts
Paints, pigments, varnishes, etc.	Real estate, realty holding, real estate agents
Fertilizers	Insurance companies (not agents)
Stone, clay, glass, and related products	Other finance—loan companies, building and loan associations, safe, exchange or pawn broking, stock exchanges, insurance agents

AFFILIATIONS WITH OTHER CORPORATIONS (See Instructions)

1. Is this a consolidated return? .... (If so, see schedule, which should be made part of this return.)

2. Was the income of this corporation ....

If so, give name of corporation which filed the consolidated return ....

PREDECESSOR BUSINESS

3. Did the corporation file a return under the same name for the preceding taxable year? .... Was the corporation in any way affiliated with or reorganized from .... business in existence during this taxable year? .... If answer is "yes," give name and address of each predecessor business ....

Upon such change were any assets valued .... If the answer is "yes," .... must be furnished.

BASIS OF RETURN

4. Is this return made on the basis of ....

If not, describe fully what other basis ....

VALUATION OF INVENTORIES

....

....

....

PREPARATION OF RETURN (See Instructions)

6. Did any person or persons .... form or schedule of this return .... actually prepare this return for the corporation? *yes* .... such person or persons and state the nature and extent .... and schedules in respect of which the assistance .... pared by any person or persons other than the corporation .... the schedules and statements which it was furnished ....

D. W. [illegible] [illegible]

INFORMATION RETURN

9. Did the corporation make a return of information on Form .... calendar year 1936? ....

LIST OF ATTACHED SCHEDULES

10. Enter below a list of all schedules accompanying this return, giving for each a brief title and the schedule number. The name and address of the corporation should be entered on each schedule accompanying the return.

....

....

....

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SCHEDULE A (See Instructions 2 and 8)

1. COST OF SALES (WHERE INVENTORIES ARE AN INCOME-DETERMINING FACTOR)		2. COST OF OPERATIONS (WHERE EXPENDITURES ARE NOT AN INCOME-DETERMINING FACTOR	
Items	Amount (Same as Item 9 p.1)	Items	Amount (Same as Item 7 p.1)
	$	Salaries and wages	$
		Other costs	

SCHEDULE B CAPITAL GAINS AND LOSSES (See Instruction 10)

			$		

EXAMPLE

NO.

77

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Jacksonville, Fla.

Mia ... #5361-A

Ma ... 6, 1955.

Judge Jay O. Thompson
Re: Properties, Inc.
Miami, Fla.

Receipt is acknowledged of your letter of recent date requesting that a reasonable extension of time within which to file your return of income tax for the year 1954.

You are hereby granted an extension of time to April 15, 1955, within which to complete your return for the taxable year above mentioned provided a tentative return is filed with the Director of Internal Revenue, Jacksonville, Florida, on or before March ..., 1955, and payment made at that time for at least one-quarter of the total estimated tax shown to be due.

The tentative return is merely a statement on the appropriate income tax form showing the name and address of the taxpayer and the estimated amount, if any, of the tax due. THE FILING OF A TENTATIVE RETURN IS A CONDITION PRECEDENT AND UNLESS COMPLIED WITH THIS EXTENSION IS NULL AND VOID.

This extension of time for filing your return does not extend the time for the payment of the tax. Payment of the tax must be made on the regular prescribed dates.

Any deficiency in the first installment of the tax will bear interest at the rate of one-half of one per cent per month from the ... the date up to the date of payment.

A COPY OF THIS LETTER MUST BE ATTACHED TO BOTH THE TENTATIVE AND COMPLETED RETURNS AS AUTHORITY FOR THE EXTENSION OF TIME HEREWITH GRANTED. FAILURE TO DO SO WILL RENDER THE RETURN SUBJECT TO PENALTY FOR DELINQUENCY.

Respectfully,

GUY T. HELVERING,
Commissioner.

J. ... DEAN

513 DUPLICATE 516

Form 707
TREASURY DEPARTMENT
Internal Revenue Service
Revised June 1933

1934 RETURN
OF
CAPITAL-STOCK TAX
For year ending June 30, 1934

DOMESTIC CORPORATIONS

(Sec. 701, Revenue Act of 1934, 73d Congress, Public, No. 216)

This return must be filed with the Collector of Internal Revenue for your district on or before July 31, 1934, and the tax must be paid on or before that date.

To be stamped by collector, showing district and date received

(Collector district)
Assessment List, Form 904
(Month) (Year)
55035
(Page) (Line)
Examined by:

1. Name Molina Properties, Inc.
(Print name of corporation, joint-stock company, or association)
2. Address 1512 Collins Avenue, Miami Beach, Florida
(The address must be that of the principal place of business. Give street and number, city or town, and State)
3. Name of parent company, if any (District filed)
4. Name of subsidiary, if any No. shares held (District filed)
(Or attach list and state number of shares held, also districts where filed)
5. Nature of business in detail Real Estate
6. Incorporated or organized in State of Florida Month May 1925

DECLARATION OF THE VALUE OF THE CAPITAL STOCK

IMPORTANT.—Before declaring a value for the capital stock, carefully read the instructions below, as a value once declared cannot later be amended.

If you file your income tax return on a calendar year basis, or would do so if subject to income tax, declare in dollars and cents a value for the entire capital stock of your corporation as of December 31, 1933, which you are willing to have assessed in the aggregate at 5 mills per dollar of such value, as a basis, subject to statutory adjustments, on which to pay capital-stock tax and excess-profits tax.

If you file your income-tax return on a fiscal year basis, or would do so if subject to income tax, declare the value as of the beginning of such fiscal year.

If your corporation was organized during the year July 1, 1933, to June 30, 1934, both dates inclusive, and if neither the calendar year nor the fiscal year for income-tax purposes has ended during the year July 1, 1933, to June 30, 1934, inclusive, declare the value as of the date of organization.

If your corporation is without a capital stock represented by shares, declare a value for the entire equity of the corporation.

(See INSTRUCTION No. 3 for additional information)

7. *	VALUE OF ENTIRE CAPITAL STOCK	$	10	[illegible]

* A specific and unqualified value must be shown in this item. If the capital stock is of no value insert the word "None"

EXEMPTIONS. (See INSTRUCTION No. 4)

8. Is exemption from the tax claimed? Answer Yes or No (.....).
9. If exemption is claimed, check the block which shows basis of claim and furnish the information required on page 2.

COMPUTATION OF TAX

10. Amount shown in item 7														
				$		10	000	00						
11. Tax at rate of $1 for each full $1,000 in item 10 (omit cents)							10	00						
12. Penalty of 25 percent for delinquency in filing return							2	50						
13. Interest								75						
14. Total tax, penalty, and interest							13	25						

AFFIDAVIT

We, the undersigned, president (or vice president, or other principal officer) and treasurer (assistant treasurer or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself, deposes and says that this return, including the accompanying schedules and statements, has been examined by him and is, to the best of his knowledge and belief, a true and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1934 and the Regulations issued thereunder.

Sworn to and subscribed before me this 26th day of April 1935

NOTARIAL SEAL

(Signature of officer administering oath) (Title)

CORPORATE SEAL

(Signature of person making affidavit)

(Title)

(See INSTRUCTION No. 7)

(3)

5-6

REVENUE ACT OF 1934

TITLE V—CAPITAL-STOCK AND EXCESS-PROFITS TAXES

SECTION 701. CAPITAL-STOCK TAX

(a) For each year ending June 30, beginning with the year ending June 30, 1934, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock.

(b) For each year ending June 30, beginning with the year ending June 30, 1934, there is hereby imposed upon every foreign corporation with respect to carrying on or doing business in the United States for any part of such year an excise tax equivalent of $1 for each $1,000 of the adjusted declared value of capital employed in the transaction of its business in the United States.

(c) The taxes imposed by this section shall not apply:

(1) to any corporation enumerated in section 101;

(2) to any insurance company subject to the tax imposed by section 201, 204, or 207;

(3) to any domestic corporation in respect of the year ending June 30, 1934, if it did not carry on or do business during a part of the period from the date of the enactment of this act to June 30, 1934, both dates inclusive; or

(4) to any foreign corporation in respect of the year ending June 30, 1934, if it did not carry on or do business in the United States during a part of the period from the date of the enactment of this act to June 30, 1934, both dates inclusive.

(d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed to the collector for the district in which is located its principal place of business or, if it has no principal place of business in the United States, then to the collector at Baltimore, Md. Such return shall contain such information and be made in such manner as the Commissioner, with the approval of the Secretary, may by regulations prescribe. The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector before the expiration of the month during which the return. If the tax is not paid when due, there shall be added as part of the tax, interest at the rate of 1 per centum a month upon the tax from the time when the tax became due until paid. All provisions of law (including penalties) applicable in respect of the taxes imposed by section 600 of the Revenue Act of 1926 shall, insofar as not inconsistent with this section, be applicable in respect of the taxes imposed by this section. The Commissioner may extend the time for making the returns and paying the taxes imposed by this section, under such regulations as he may prescribe, with the approval of the Secretary, but to such extension shall be for more than 60 days.

(e) Returns required to be filed for the purpose of the tax imposed by this section shall be open to inspection in the same manner, to the same extent, and subject to the same provisions of law, including penalties, as returns made under title II of the Revenue Act of 1926.

(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the valuation disclosed by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section). For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value plus (1) the cash and fair market value of property paid in for stock or shares, (2) paid-in surplus and contributions to capital, (3) its net income, (4) the excess of its income wholly exempt from the taxes imposed by title I over the amount disallowed as a deduction by section 24(a) (5) of such title, and (5) the amount of the dividend deduction allowable for income-tax purposes, and minus (A) the value of property distributed in liquidation to shareholders, (B) distribution of earnings or profits, and (C) the excess of the deductions allowable for income-tax purposes over its gross income; adjustment being made for each income-tax taxable year included in the period from the date as of which the original declared value was declared to the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section. The amount of such adjustment for each such year shall be computed (on the basis of a separate return) according to the income-tax law applicable to such year. For any subsequent year ending June 30, the adjusted declared value in the case of a foreign corporation shall be the original declared value adjusted (for the same income-tax taxable years as in the case of a domestic corporation), in accordance with regulations prescribed by the Commissioner, with the approval of the Secretary, to reflect increases or decreases in the capital employed in the transaction of its business in the United States.

SECTION 702. EXCESS-PROFITS TAX

(a) There is hereby imposed upon the net income of every corporation, for each income tax taxable year ending after the close of the first year in respect of which it is taxable under section 701, an excess-profits tax equivalent to 5 per centum of such portion of its net income for such income-tax taxable year as is in excess of 12½ per centum of the adjusted declared value of its capital stock (or in the case of a foreign corporation the adjusted declared value of capital employed in the transaction of its business in the United States) as of the close of the preceding income-tax taxable year (or as of the date of organization if it had no preceding income-tax taxable year) determined as provided in section 701. If the income-tax taxable year in respect of which the tax under this section is imposed is a period of less than 12 months, such adjusted declared value shall be reduced to an amount which bears the same ratio thereto as the number of months in the taxable year bears to 12 months. For the purposes of this section the net income shall be the same as the net income for income-tax purposes for the year in respect of which the tax under this section is imposed.

(b) All provisions of law (including penalties) applicable in respect of the taxes imposed by title I of this act, shall, insofar as not inconsistent with this section, be applicable in respect of the tax imposed by this section, except that the provisions of section 131 of that title shall not be applicable.

SECTION 703. CAPITAL-STOCK TAX AND EXCESS-PROFITS TAX IMPOSED BY NATIONAL INDUSTRIAL RECOVERY ACT

Sections 217(d) and (e) of the National Industrial Recovery Act are amended to read as follows:

"(d) The capital-stock tax imposed by section 215 shall not apply to any taxpayer in respect of any year except the year ending June 30, 1933.

"(e) The excess-profits tax imposed by section 216 shall not apply to any taxpayer in respect of any taxable year ending after June 30, 1934."

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RETURN FORM MARKED "DUPLICATE" MUST BE FILED WITH THIS ORIGINAL RETURN

Form 1120
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

CORPORATION INCOME AND EXCESS-PROFITS TAX RETURN

For Calendar Year 1936

Page 1 of Return

(Collector's Stamp)

File Code 4 1 8

Serial Number

District

For Fiscal Year begun , 1936, and ended , 1937

PRINT PLAINLY CORPORATION'S NAME AND BUSINESS ADDRESS

MOLINE PROPERTIES INC

(Name)

1512 [illegible] AVENUE

(Number and street)

[illegible] DADE FLORIDA

(City or town) (County) (State)

(See Schedule I except Where Otherwise Provided in the Instructions That This Form be Completely Filled in Every Case of Any Statements, Schedules, or Reports Submitted Herewith)

EXCESS PROFITS TAX COMPUTATION

NET INCOME TAX COMPUTATION

A [illegible]

[illegible]

[illegible]

of 1936 [illegible] 1936.

For Example, Except Where Otherwise Provided in the Instructions, That This Form be Completely Filled in Irrespective of Any Statements, Schedules, or Reports Submitted Herewith

EXCESS PROFITS TAX COMPUTATION

22%

27%

Total Normal Tax and Surtax (Item 22 page 1) ..... $

Credit for tax paid to a foreign country or United States possession by a domestic corporation (see Instruction 30) ..... $

13 Underwriting deductions
(a) Donations, gratuities, and contributions $

(b) (1) Income tax paid to the United States
(2) Income and profits taxes paid to United States possessions or foreign countries if claimed as a credit whole or in part on Item 48, page 1 of the return

c Federal taxes paid or accrued (see Instruction 6)
d Agents' balances or accounts charged off (less the amount recovered on the property account)
e Furniture and fixtures, additions or improvements thereto as expensed on the return

Reinsurance and recoveries
f Insurance premiums paid or the cost of other insurance (except reinsurance of life risks) relating to insurance policies and annuity contracts
g Interest on indebtedness incurred or continued on property (except interest on indebtedness which has been incurred or continued to purchase or carry obligations the interest on which is wholly exempt from the taxes imposed by this subchapter)

LIABILITY FOR FILING RETURNS

Insurance generally

Foreign corporations within the possessions of the United States

Foreign corporations. Every foreign corporation

Life insurance companies. Every life insurance company

Mutual insurance companies other than life insurance companies. Every mutual insurance company other than a life insurance company

SIGNATURES AND VERIFICATION

PAYMENT OF TAX

The tax imposed by section 831 of the Revenue Act of 1942 shall be paid by the taxpayer at the time and in the manner provided for the payment of income taxes under section 56 of the Revenue Act of 1942 and regulations 94.

If any installment of estimated tax is not paid on or before the date prescribed for its payment, there shall be added to the amount of the tax unpaid as the case may be

PENALTIES

LIABILITY FOR FILING RETURNS

...rations generally

...rporations within the possessions of the United States

...ge corporations.

...surance companies, other than life insurance companies

...ther insurance companies

TIME AND PLACE FOR FILING

SIGNATURES AND VERIFICATION

PAYMENT OF TAX

PENALTIES

For willful failure to make and file return on time

For willfully attempting to evade or defeat payment of the tax

For deficiency due to negligence or fraud

AFFIDAVIT (See "Signature and Verification", above)

...the individual, partner, principal officer and treasurer (or assistant treasurer, or chief accounting officer) of the corporation ... with the ... each for himself deposes and says that this return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct and complete return made in good faith for the taxable year stated pursuant to the Revenue Act of 1936, as amended, and the Revenue Act of 1938, and [illegible]

...sworn and subscribed before me this 30 day of ..., 19...

(SEAL)

...(Signature of officer authorized to administer oaths)

...(Signature of person making return) (Title) ...(Individual, partner, principal officer, Treasurer, Assistant Treasurer, or Chief Accounting Officer)

AFFIDAVIT (See "Signature and Verification", above)

I (or we) swear (or affirm) that I (or we) prepared this return for the person named herein and that I (or we) know the contents thereof (including any accompanying schedules and statements) and that to the best of my (our) knowledge and belief it is a true, correct, and complete statement of all the information respecting the income tax and/or unemployment tax liability of the person for whom this return has been prepared, of which I (or we) have any knowledge.

Subscribed and sworn to before me this ..... day of ....., 193 .

...(Signature of person preparing the return)

...(Address)

United States Board of Tax Appeals

Received

Mar 21 1942

Filed

Mar 21 1942

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner on Review, v. MOLINE PROPERTIES, INC., Respondent on Review.	B. T. A. Docket No. 103862

PRAECIPE FOR RECORD

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause, in connection with the petition for review by the said Circuit Court of Appeals for the Fifth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.

2. Pleadings before the Board:

(a) Petition, including annexed copy of deficiency notice.

(b) Answer.

3. Findings of fact and opinion promulgated November 7, 1941.

4. Decision entered November 7, 1941.

5. Petition for review and assignments of error.

6. Notices of filing petition for review.

7. Statement of Evidence.

8. Petitioner's Exhibit 1 (Charter consisting of 8 sheets, and minutes of Directors' meeting of October 1, 1929, only); Respondent's Exhibit A, 1934 Federal income tax return of Moline Properties, Inc.; Respondent's Exhibit D—1936 Federal income tax return of Moline Properties, Inc. (sheets 1 and 6 only); Respondent's Exhibit E—1936 Federal income tax return of Uly O. Thompson.

9. This Praecipe.

J. P. WENCHEL,

Chief Counsel,

Bureau of Internal Revenue.

Statement of Service:

A copy of this praecipe for record was mailed to Douglas D. Felix, Esq., Congress Building, Miami, Florida, attorney for respondent on review, this date, March 20, 1942.

CHAS. E. LOWERY,

Special Attorney,

Bureau of Internal Revenue.

UNITED STATES BOARD OF TAX APPEALS

WASHINGTON

COMMISSIONER OF INTERNAL REVENUE, Petitioner, v. MOLINE PROPERTIES, INC., Respondent.	Docket No. 103862

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 79, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 1st day of April, 1942.

B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

(Seal)

[fol. 89] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of October 13th, 1942

No. 10279

COMMISSIONER OF INTERNAL REVENUE

versus

MOLINE PROPERTIES, INC.

On this day this cause was called, and, after argument by Benjamin M. Brodsky, Esq., Special Assistant to the Attorney General, for petitioner, and Douglas D. Felix, Esq., for respondent, was submitted to the Court.

[fol. 90] OPINION OF THE COURT—Filed November 7, 1942

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10279

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

versus

MOLINE PROPERTIES, INC., Respondent

Petition for Review of Decision of the United States Board of Tax Appeals (District of Florida)

(November 7, 1942)

Before Sibley, Holmes, and McCord, Circuit Judges

McCORD, Circuit Judge:

The petition involves income and excess-profits taxes for the years 1935 and 1936, and a delinquency penalty for the year 1936. The facts are stated in detail by the Board

of Tax Appeals in its reported opinion, *Moline Properties, Inc.*, 45 B. T. A. 647.

The respondent, Moline Properties, Inc., was organized in 1928, and at all times Uly O. Thompson has been its president and sole stockholder, with the exception of holders [fol. 91] of qualifying shares. The corporation was organized at the suggestion of Thompson's creditors as a means of protecting investments and saving his equity in certain parcels of real estate located in Florida; the mortgagee having agreed to advance further funds on condition that the corporation should be organized. The property was conveyed by Thompson to the corporation, and the stock issued to him was pledged with the mortgagee and placed in a voting trust. On July 29, 1933, the corporation satisfied the two outstanding mortgages with funds secured from a new mortgage loan. Control of the corporation was returned to Thompson in 1933.

Moline Properties, Inc., did not keep books of account or maintain a bank account. It owned no assets other than the real estate. In 1934 it leased a portion of its properties for use as a parking lot and received $1,000.00 as rental. Thompson owned other extensive real property holdings in Miami, Florida, title to all of which was in his name individually.

The real property held by Moline Properties, Inc., was sold in three separate parcels, one each in the years 1934, 1935, and 1936. The corporation transacted no further business after sale of the last parcel of property in 1936. The Board of Tax Appeals sustained the taxpayer's contentions and held that the corporation functioned merely as an agent for Thompson; that the corporate existence must be disregarded in taxing the gains from the sales of the property of the corporation; and that, treating Moline Properties, Inc., as a corporation without substance, Thompson was entitled to report the proceeds from the sales as his individual income. By timely petition for review the Commissioner of Internal Revenue questions the correctness of the Board's decision.

[fol. 92] The Board of Tax Appeals erred in its decision. Ordinarily a corporation and its stockholders are for purposes of taxation held to be separate entities, and the rule is not changed by the mere fact that one person owns all or substantially all of the stock of the corporation. *Planter's Cotton Oil Co. v. Hopkins*, 53 F. 2d 825; *Watson v. Com-*

missioner, 124 F. 2d 437. In tax matters "the tendency is not to ignore the corporate entity unless it be used to defraud the law, but rather, when natural persons are using corporate forms to do their business, they and their corporations are held to the literal consequences." *Banckner v. Commissioner*, 76 F. 2d 1. In the case at bar Thompson, for reasons satisfactory to himself and to his creditors, elected to employ a corporation in the handling of certain parcels of his real estate. Having chosen the corporate form to conduct these affairs, both Thompson and his corporation must accept the tax disadvantages of the plan; and they may not now, in order to escape corporate taxes, be heard to disavow the corporate existence and allege that the respondent was merely a "dummy" corporation. *Higgins v. Smith*, 308 U. S. 473, 477; *Interstate Transit Lines v. Commissioner*, 130 F. 2d 136.

The gains from the sales of the properties of the corporation were taxable to the respondent. Accordingly, the petition is granted, and the decision of the Board of Tax Appeals is reversed with directions to enter decision for the Commissioner.

[fol. 93] JUDGMENT

Extract from the Minutes of November 7th, 1942

No. 10279

COMMISSIONER OF INTERNAL REVENUE

versus

MOLINE PROPERTIES, INC.

This cause came on to be heard on the petition of Commissioner of Internal Revenue for a review of a decision of the United States Board of Tax Appeals, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that said petition be, and the same is hereby, granted; and that the decision of the said United States Board of Tax Appeals in this cause be, and the same is hereby, reversed with directions to enter decision for the Commissioner.

[fol. 94] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR REHEARING

[fol. 95] To The Honorable United States Circuit Court of Appeals for the Fifth Circuit:

Comes Now Moline Properties, Inc., by its unsigned attorney, and presents this, its petition for a rehearing of said cause, in which final judgment was rendered by this court on November 7th, 1942, reversing the opinion and judgment of Board of Tax Appeals; and in support of this petition, it respectfully shows:

1

That this Honorable court overlooked and failed properly to consider that the Board of Tax Appeals found *as matters of fact*, either under its caption, "Findings of Fact", or under its caption, "Opinion", from the testimony and documentary proof, the following:

(a) That the loan of $6750.00 was made to *Thompson*, although the note, of necessity, was executed by the corporation, but the Bank required Thompson to endorse it.

(b) That the corporation was organized by and upon the suggestion or demand of the bank to hold title to the real estate involved. "That the primary purpose" in forming the corporation was, the "protection of the stockholders' creditors", which places it in the category of a dummy corporation. (40 B.T.A. 653).

(c) The record of testimony and findings of the Board of Tax Appeals clearly indicate the corporation engaged in no business, had no bank account, paid its officers no salary, received no income from any source, whatsoever, (Thompson was paid the $1000.00 lease money), paid no subsequent [fol. 96] taxes, state, county, or city; and that the only loan negotiated after the corporation was formed, from National Investment Holdings, was made direct to Judge Uly O. Thompson. The checks from National Holdings were

made payable to Thompson, as well as the payment of $1000.00 covering the parking lot lease.

(d) The record of testimony further discloses that the expenses of the restriction suit,—attorney's fees, court costs, etc., while brought nominally in the name of Moline Properties, were paid by Thompson, aggregating an amount in excess of $4000.00.

(e) The record of testimony and findings and opinion of the Board of Tax Appeals clearly established that the *primary* purpose for forming the corporation, as is borne out by the trust agreement, was to enable the bank to bolster up its financial status and to enable it to make quick sale and delivery of the property involved under the powers of said voting trust, regardless of whether the corporation, Moline Properties, or Thompson, wished, or did not wish, to sell the real estate.

(f) The record of testimony and findings of fact by the Board of Tax Appeals and its opinion fairly established that the beneficial interest of Thompson in said property was not altered or changed; that he received all income from the property and paid all expenses in relation thereto; that he was relieved of no personal liability because of its formation, but personally endorsed the $6750.00 note which he afterward paid with money actually advanced to him, by National Investment Holdings, Inc., and that he afterwards [fol. 97] assumed and paid the expenses of the restriction suit, though brought in the name, nominally, of Moline Properties, Inc.

(g) That from its very inception, the corporation, as such, had no apparent assets, and no way of coming into possession of any, with the exception of the real estate involved herein, for the simple reason that *all* of the corporate stock was issued to, or controlled by, Thompson, directly or indirectly, as under the trust agreement, from the very day the corporation came into existence.

(h) The undisputed testimony and findings by the Board of Tax Appeals clearly established that the corporation was formed, *primarily* as a receptacle to hold legal title to this particular piece of real estate, only, and that its limited activities did not constitute engaging in business as a separate entity.

(i) That Thompson was the real and beneficial owner of all,—not 98%,—of the stock of Moline Properties, Inc.

2

The court overlooked that there is no testimony in the entire record, nor finding by the Board of Tax Appeals, that the form employed for doing business or carrying out the challenged tax event was unreal or a sham; but, on the contrary, the Board of Tax Appeals found that Thompson owned *all* the stock, that the corporation existed, only, for the limited purpose of holding title to the described real estate, primarily to secure its creditors; and that since Thompson commanded at all times, the entire income and benefits of the property involved,—as well as being person-
[fol. 98] ally responsible for all its debts,—he is entitled to be determined as the real owner of the property, and was entitled to make the return and take the exemptions, here in dispute. (Higgins v. Smith 308 U. S. 473 text 478).

3

Since this honorable court did not question the findings of fact made by the Board of Tax Appeals, it is respectfully suggested that the court overlooked and failed to apply the applicable principle of law, that where "There is no challenge to the findings of fact made by the Board of Tax Appeals as being unsupported by evidence, they must be treated as conclusive". Burnett, commissioner of Internal Revenue, v. Leininger. 52 Su. Ct. R. 345; 285 U. S. 136. Phillips v. Commissioner 283 U. S. 589, 599, 600.

4

This honorable court overlooked and failed to apply the applicable principles of law that it will not review findings of fact made by the Board of Tax Appeals, unless it appears that such findings are not supported by *any* substantial evidence. Helving v. Rankin, 55 S. Ct. 732; *Phillips v. Commissioner of Internal Revenue*, 283 U. S. 589; *Burnet v. Leininger*, 285 U. S. 136; *Old Mission Portland Cement Company v. Helvering*, 293 U. S. 289; *General Utilities & Operating Company v. Helvering*, 56 S. Ct. 185; *Avery v. Commissioner*, 22 Fed. (2d) 6 (CCA 5); *Hamilton Carhartt Cotton Mills v. Commissioner of Internal Revenue*, 56 Fed. (2d) 145 (CCA 5).

Based upon the findings of fact and opinion of the Board of Tax Appeals, and upon the entire record of testimony [fol. 99] in said cause, it is respectfully submitted that the opinion of this court is in error since "It is command of income and its benefits which marks the real owner of property". (Higgins v. Smith. 84 Law Ed. 411; 308 U. S. 478).

Respectfully submitted, H. H. Eyles, Thomas H. Anderson, Attorneys for Petitioner.

Certificate Of Counsel

I hereby certify that I have read the Petitioner's Petition for Re-Hearing and in my judgment it is well founded and is not interposed for the purpose of delay.

H. H. Eyles, Attorney for Petitioner.

[fol. 100] ORDER DENYING REHEARING

Extract from the Minutes of December 11, 1942

No. 10279

COMMISSIONER OF INTERNAL REVENUE

versus

MOLINE PROPERTIES, INC.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 101] MOTION AND ORDER STAYING MANDATE—Filed December 28, 1942

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10279

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

versus

MOLINE PROPERTIES, INC., Respondent

Now comes the respondent and petitions the court to enter an order staying the mandate herein, and for grounds thereof, says:

1. That the respondent is preparing and intends to file in the United States Supreme Court, a petition for Writ of Certiorari, and that the respondent requires at least twenty days for the completion and filing of said petition.

Dated at Miami, Florida, December 21st, A. D. 1942.

(Signed) H. H. Eyles, Thos. H. Anderson, Attorneys for Respondent.

[fol. 102] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 10279

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

versus

MOLINE PROPERTIES, INC., Respondent

On Consideration of the Application of the Respondent in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Respondent to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record and brief have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at Montgomery, Ala., this 26th day of December, 1942.

(Signed) Leon McCord, United States Circuit Judge.

[fol. 103] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 104] SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 660

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed March 8, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. The case is transferred to the summary docket and assigned for argument immediately following No. 552.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: Enter Bart A. Riley. File No. 47,-161. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 660. Moline Properties, Inc., Petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed January 18, 1943. Term No. 660 O. T. 1942.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 660

MOLINE PROPERTIES, INC.,
Petitioner,

—vs.—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

H. H. EYLES,
BART A. RILEY,
Selbold Building,
Miami, Florida.
THOMAS H. ANDERSON,
First National Bank Building,
Miami, Florida.
Attorneys for Petitioner.

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—VS.—

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Respondent.

No.....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Moline Properties, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered on November 7, 1942, in a cause numbered and entitled on its Docket No. 10279, Commissioner of Internal Revenue, Petitioner, vs. Moline Properties, Inc., Respondent, reversing the decision of the United States Board of Tax Appeals. Petition for rehearing was denied December 11, 1942.

OPINION BELOW

The opinion of the Board of Tax Appeals is reported at 45 B.T.A. 647 (Rec. P. 19). The opinion of the Circuit Court of Appeals is not yet reported but is available in the Commerce Clearing House 1942 Federal Tax Service at paragraph 9728 on page 10717. (Rec. p. 90).

STATUTES INVOLVED

The statutes involved, set out, *infra*, in the appendix, are:

> Sections 13(a), 22(a), and 52 of the Revenue Act of 1934, ch. 277, 48 Stat. L. 680, and Sections 13(b), 22(a), and 52 of the Revenue Act of 1936, ch. 690, 49 Stat. L. 1648.

SUMMARY STATEMENT OF MATTER INVOLVED

This proceeding is an income tax case involving the taxable years 1935 and 1936. The Board of Tax Appeals (now the Tax Court) in a decision rendered November 7, 1941, sustained the petition of Moline Properties, Inc., for a redetermination of the petitioner's tax liability for 1935 and 1936, and held that there was no deficiency or penalty. The Commissioner had asserted deficiencies for 1935 and 1936 in the amounts of $4,993.82 of income taxes, and $4,344.95 of excess profits taxes, plus a delinquency penalty for 1936 or $788.35. The board rendered a decision finding no deficiency (Rec. p. 22). On the Commissioner's appeal the Circuit Court of Appeals for the Fifth Circuit, reversed. (Rec. p. 90). This petition is to obtain a review of that decision.

All of the asserted deficiencies are predicated upon the Commissioner's insistence upon recognition of the separate entity of a "dummy" corporation. During the year 1928 one Uly O. Thompson, a resident of Florida and a Circuit Judge in that state, was the owner of a large amount of real estate. He was hard pressed financially for ready money. Among the parcels of real estate owned by him were four lots in Miami Beach, Florida, on which were two mortgages, one of $20,000 held by one William F. Whitman, the other, a second mortgage, also for $20,000, held by the Miami Beach Bank and Trust Company. These mortgages had been given in 1923 and 1926, respectively. The land did not prove profitable. In 1928 back taxes on it amounted to $6,500. Pressed by the second mortgagee to pay the

taxes or lose the property (P. 36), he sought, upon demand of the Bank, and obtained from the Bank of Bay Biscayne, an affiliate of the second mortgagee, a loan of $6,750, on the condition that he convey title to a corporation organized by the bank to hold title. Stock was to be issued to Thompson to be turned over to the bank as collateral and be voted by a bank officer under a voting trust in favor of the bank, which, however, was to cease on payment of the loan or sale of the stock pledged. The bank organized the petitioner corporation under this arrangement (Rec. p. 33 and 36). Thompson, on June 5, 1928, conveyed the four parcels to it, in return for its stock, which he conveyed to the bank's voting trustee. The corporation assumed the mortgages. Moline Properties, Inc., was "purely a receptacle to hold the title to this property in order to get the bank to loan that money, take care of the taxes" (Rec. p. 36). The incorporators, dummies of course, were employes of the bank (Rec. p. 38), and the bank's lawyers did the legal work *(ibid)*.

The Bank of Bay Biscayne closed during 1930, and thereafter its powers under the voting trust were exercised by the bank's liquidator. During this period it was necessary to institute a suit to remove certain restrictions imposed on the property in prior deeds. Expenses in connection with that suit, over $4,000, were borne by Thompson. (Rec. p. 41).

The encumbrances on the property were liquidated in 1933 by payment, made possible by borrowing the funds elsewhere. This loan was secured by a mortgage on part of the property in question. On the payment of these encumbrances in 1933, the control of the petitioner corporation was returned to Thompson. The new debt was repaid in 1936 through the sale of property.

The taxpayer, the petitioner herein, kept no books of account and never had a bank account. It owned no assets other than the real estate in question. It never

transacted any business, except as herein stated, other than the lease in 1934 of part of the real estate for a parking lot, from which $1,000 was received. The corporation never had any office, place of business or employes. Its sole function was, at the insistence of the bank, to hold title to the four lots. Thompson owned other extensive real property in Miami, title to all of which was in his name, individually.

The property so transferred to the petitioner corporation was sold in three separate parcels in each of the years 1934, 1935 and 1936. The proceeds were received by Thompson and deposited in his bank account. This proceeding involves the sales made in 1935 and 1936. Sales made in 1934 and 1935 were reported by petitioner in a corporation income tax return. Thompson himself, who testified (Rec. p. 45) that he, while a Circuit Judge, was exceedingly busy, never made out an income tax return in his life[1], and knew nothing about the income tax law, employed an auditor to make out his returns. The latter during 1936 learned (Rec. p. 56) of the decision of the Board of Tax Appeals in the *Forshay* case, 20 B.T.A. 537, and suggested to Thompson that Moline Properties, Inc., was also a "dummy" corporation. Acting on his advice, a claim for refund for 1935 was filed by the corporation, and, also on the auditor's advice, the 1936 sales were included by Thompson in his personal return for that year, no return being filed for the corporation. The Commissioner asserted the 1935 deficiency on grounds not here material, and also asserted a deficiency for 1936, plus the statutory penalty for delinquency. Both deficiencies are bottomed on the formal existence of the separate entity.

The foregoing facts are not in dispute, and are set out in the Board's findings (Rec. pp. 17-19). The Board in its opinion recited (Rec. p. 21) that it must be ap-

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[1]At that time it was supposed that state judges' salaries were exempt from the federal income tax.

parent that the petitioner existed for very limited purposes, the primary one being the protection of creditors. Full beneficial ownership was said by the Board to be in Thompson, who continued to manage and regard the property as his own individually. Citing some of its own earlier decisions, the Board said (Rec. p. 21) that it had frequently held that a corporation which existed merely to facilitate the passage of title to real estate, where the stockholders acted without regard for the corporate entity, was "a mere figmentary agent which should be disregarded in the assessment of taxes." For this reason the Board sustained the petition (Rec. p. 22) and entered a decision of no deficiency or delinquency penalty *(ibid)*.

The Circuit Court of Appeals reversed. The opinion is very brief. The sole ground of the decision is that Thompson "elected to employ a corporation in the handling of certain parcels of his real estate" and that "having chosen the corporate form to conduct these affairs, both Thompson and the corporation must accept the tax disadvantages," and may not "be heard to disavow the corporate existence" to escape corporate taxes. The Court therefore has squarely held that there is an estoppel against a taxpayer's ever invoking the "agency" doctrine, where a corporation is a mere "dummy," or instrumentality or agent of its owners, and that in no conceivable circumstances may the "agency" doctrine ever be applied at a taxpayer's instance. This, it may be suggested, is in harmony with the Commissioner's invariable contention since this Court's decision in *Higgins v. Smith*, 308 U. S. 473, 60 S.Ct. 355, 84 L.Ed. 406, and rests on the supposed effect of certain language in that case. Because on this question the authorities are in conflict and the question has never been authoritatively determined by this Court, this petition for review is presented.

JURISDICTION

This being an application for a review of a final judgment of the Circuit Court of Appeals for the Fifth Circuit, the jurisdiction of this Court is sustained by Section 240 of the Judicial Code, as amended (U. S. Code, Title 28, Section 347), and by Section 1141 of the Internal Revenue Code (U. S. Code, Title 26, Section 1141). The Circuit Court of Appeals had jurisdiction under the second of these sections, namely Section 1141.

The judgment of the Circuit Court of Appeals was entered November 7, 1942 (Rec. p. 93). Timely petition for rehearing was filed which was denied December 11, 1942 (Rec. p. 100).

Cases believed to sustain the jurisdiction are:

Old Colony Trust Co. v. *Commissioner*, 279, U. S. 716, 49 S.Ct. 499, 73 L.Ed. 918;

Magnum Import Co. v. *Coty*, 262 U. S. 159, 43 S.Ct. 531, 67 L.Ed. 922;

Columbus Watch Co. v. *Robbins*, 148 U. S. 266, 13 S.Ct. 594, 37 L.Ed. 445;

Smith v. *Wilson*, 373 U. S. 388, 47 S.Ct. 385, 71 L.Ed. 699.

QUESTION PRESENTED

The question presented is whether, notwithstanding that facts are found by the Board (now the Tax Court) to warrant disregard of the separate entity of a "dummy" corporation whose sole function is to hold title to real estate, the taxpayer corporation and Uly O. Thompson are estopped, as a matter of law, from asserting disregard of the separate corporate entity, and that the corporation should be treated as a mere agency or instrumentality and ignored for tax purposes.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of the Circuit Court of Appeals is in conflict with the decision of the Fourth Circuit Court of Appeals in *United States* v. *Brager Building and Land Corporation,* 124 F. (2d) 349, which squarely holds that, notwithstanding certain language in *Higgins* v. *Smith,* 308 U. S. 473, 60 S.Ct. 355, 84 L.Ed. 406, "it is going too far to say that if a taxpayer forms a corporation for his convenience he is thereafter estopped from disclosing the true nature of the arrangement whenever it is of advantage to the government to recognize only the corporate form."

The decision also is in conflict with *North Jersey Title Insurance Co.* v. *Commissioner,* 84 Fed. (2d) 898 (C.C.A. 3), and with *Inland Development Co.* v. *Commissioner,* 120 Fed. (2d) 986. There are other cases as well which have permitted a taxpayer to invoke the "agency" doctrine to avoid or reduce taxes.

The above cases cannot be easily reconciled with the decision below. There are slight factual differences, of course; but in these cases the taxpayer in each one was permitted to invoke the doctrine. In the *Brager* case the court squarely held that there was no estoppel against the taxpayer; the Court below in the present case holds the contrary, and does so in the face of the familiar rule making the factual determination of the Board (now the Tax Court) final, and takes the broad position that there is such an estoppel.

2. This case involves an important question of Federal Law which has not been but should be settled by this Court.

This Court in *Higgins* v. *Smith,* 308 U. S. 473, 60 S.Ct. 355, 84 L.Ed. 406, had before it a case in which the government asked for the disregard of the corporate entity. In support of what were the actualities of that

case, this Court did so disregard the corporate entity, saying in that connection that a taxpayer having elected to do business as a corporation must accept the tax disadvantages, and that the government might look at actualities and "sustain or disregard the effect of the fiction as best serves the purposes of the tax statute." This doctrine is now being urged everywhere by the Commissioner and is being regarded by some courts as a pronouncement in effect that a taxpayer may never invoke the agency doctrine. The Court below cited in support of the conclusion reached in its brief opinion the decision of this Court in *Higgins* v. *Smith, infra,* and the Eighth Circuit decision in *Interstate Transit Lines, Inc.* v. *Commissioner* 130 Fed. (2d) 136, in which according to the Commerce Clearing House 1942 Federal Tax Service (page 9004), a review is now being sought in this Court. Subsequent to its decision in the case just mentioned, the Eighth Circuit Court of Appeals later, in *Palcar Real Estate Co.* v. *Commissioner,* decided November 3, 1942, not yet reported but available in the Commerce Clearing House 1942 Federal Tax Service, at paragraph 9733, on page 10728, said that as its members read the expressions in *Higgins* v. *Smith*, it appeared settled that a corporation could not "claim the status of a mere nominality for income tax purposes, in order to improve the position of its stockholders," and said further that it was immaterial that the corporation might neither have been intended used to secure a tax advantage.

Yet in *United States* v. *Brager Building and Land Corporation,* 124 Fed. (2d) 349, the Fourth Circuit Court of Appeals, after saying that there was not necessarily an estoppel against the taxpayer "from disclosing the true nature of the arrangement," added that the contrary had been held in many decisions and that its judges "do not understand that this body of the law has for practical purposes ceased to exist." The "body of law" referred to was that based on cases like the following:

Southern Pacific v. *Lowe*, 247 U. S. 330, 38 S.Ct. 540, 62 L.Ed. 1142;

Gulf Oil Corporation v. *Lewellyn*, 248 U. S. 71, 39 S.Ct. 35, 63 L.Ed. 133;

Weiss v. *Stearn*, 265 U. S. 242, 44 S.Ct. 490, 68 L.Ed. 1001;

North Jersey Title Insurance Co. v. *Commissioner*, 84 Fed. (2d) 898 (C.C.A. 3);

Western Maryland Ry. v. *Commissioner*, 33 Fed. (2d) 695 (C.C.A. 4);

New York Central R. R. v. *Commissioner*, 79 Fed. (2d) 247 (C.C.A. 2); Certiorari denied 296 U. S. 653, 56 S.Ct. 370, 80 L.Ed. 465;

Under that "body of law" there was much support for the view that although ordinarily the separate entity must be respected both by the government and the taxpayer, yet in a proper case and on facts evidencing that a corporation is a mere agency or instrumentality, actualities will control. True, it would require a stronger showing when it was the taxpayer who or which seeks to avoid the consequences of the existence of the corporate entity he or it has been responsible for; but under this "body of law" there was no estoppel against the taxpayer if strong enough facts were put forward. The substance, not the form, was allowed to control.

The Board of Tax Appeals has applied the same doctrine in numerous cases, some of which it cited in support of its conclusion in this very case, and are set out in its opinion (Rec. p. 21).

Since the decision in *Higgins* v. *Smith*, *supra*, the Tenth Circuit Court of Appeals in *Inland Development Co.* v. *Commissioner*, 120 Fed. (2d) 986, *supra*, making no mention of the dictum relied on by the Commissioner

and the Court below, and stressed by the Eighth Circuit Court of Appeals in the *Palcar Real Estate Co.* case, *supra*, cited *Higgins* v. *Smith* as an authority favoring the disregard of the corporate entity in a case where it was to the taxpayer's interest to do so. That court also evidently did not think that "this body of the law has now for practical purposes ceased to exist."

The *Brager* and *Inland Development Co.* cases naturally have some minor and unimportant fact differences not in any way going to the fundamental question, which is whether under any circumstances a taxpayer may invoke the "agency" doctrine, or is wholly estopped from doing so by the mere circumstance, without more, that he has brought the entity into its fictional being. Stated differently, does the dictum in *Higgins* v. *Smith* overrule that "body of law," overrule *Southern Pacific* v. *Lowe, Gulf Oil Corp.* v. *Lewellyn*, and *Weiss* v. *Stearn*, and disapprove cases like *North Jersey Title Insurance Co.* v. *Commissioner?* If so, then the *Brager* and *Inland Development Co.* cases have misread this Court's opinion in *Higgins* v. *Smith;* but if the dictum was not intended to have the effect, to borrow the language of the *Brager* case, "that this body of the law has now for practical purposes ceased to exist," the Court below erred in reversing the decision of the Board of Tax Appeals.

If there is such an estoppel, the point should be clarified by a decision of this Court. The fact that this important question has never been decided by this Court makes this case an appropriate one for decision by this Court.

CONCLUSION

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this court

for its review and determination, on a day to be therein named, a full and complete transcript of the record and all proceedings in this case numbered and entitled on its docket as Number 10279, *Commissioner of Internal Revenue* v. *Moline Properties, Inc.*, and that the decision of the United States Board of Tax Appeals be reinstated and the judgment of the United States Circuit Court of Appeals be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Court may seem proper.

Dated at Miami, Florida, January 12, 1943.

Respectfully submitted,

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.....

Attorneys for Petitioner.

H. H. EYLES

THOS. H. ANDERSON,

BART A. RILEY

Attorneys for Petitioner.

(NOTE: Since the legal propositions upon which petitioner relies have been discussed sufficiently in the foregoing petition, petitioner refrains, in the interest of brevity from appending a brief).

APPENDIX

Revenue Act of 1934, ch. 277, 48 Stat. 680:

SEC. 13. TAX ON CORPORATIONS.

(a) *Rate of Tax.* There shall be levied, collected, and paid for each taxable year upon the net income of every corporation, ***

SEC. 22. GROSS INCOME.

(a) *General Definition.* "Gross income" includes gains, profits and income derived from ***sales, ***

SEC. 52. CORPORATION RETURNS.

Every corporation subject to taxation under this title shall make a return, ***

Revenue Act of 1936, ch. 690, 49 Stat. 1648:

SEC. 13. NORMAL TAX ON CORPORATIONS.

* * *

(b) *Imposition of Tax.* There shall be levied, collected, and paid for each taxable year upon the normal-tax net income of every corporation, a normal tax as follows:

* * *

The provisions of Sections 22(a) and 52 of the Revenoue Act of 1936, *supra,* are identical with those set forth above.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 660

MOLINE PROPERTIES, INC.,
Petitioner.

——vs.——

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF OF PETITIONER

BART A. RILEY,
Seybold Building,
Miami, Florida.

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Attorneys for Petitioner.

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CITATIONS

IN THE

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No. 660

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——vs.——

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF OF PETITIONER

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Respondent asserts (brief p. 9) that the Court below did not hold that "in every instance a taxpayer who forms a corporation is precluded from showing the true nature of the arrangement so as to escape a tax disadvantage," and devotes much space to factual details claimed now to preclude invoking the "agency" doctrine, and he concludes his agrument (brief p. 11) by saying that the present case does not raise the question whether under any circumstances a taxpayer may invoke the "agency" doctrine. His position here is in sharp contrast to his argument in the Court below. There, confronted with the Board's ultimate conclusion of fact that Thompson had "full beneficial ownership" of the property, the corporation being "a mere figmentary

agent" (Rec. p. 21)[1], the respondent contended that a stand by the government requiring recognition of a "sham" corporation because it was to the advantage of the revenue "requires no apology in the light of the express language of *Higgins* v. *Smith*." And in his letter[2] to the Clerk of the Court below, in response to the taxpayer's petition for rehearing, respondent asserted that "actually" the decision of the Court below "was that the Board had erred in its application of legal principles to the facts before it," and that the question was "not whether a given transaction * * * was a reality or a sham, but whether a voluntarily selected form for carrying on a business could be disavowed when a tax saving might result."

Thus, when confronted with an adverse factual determination by the Board respondent argued in effect that the "agency" doctrine can never be invoked. Yet here he asserts that the "facts" distinguish the present case from those in which the "agency" doctrine has been successfully invoked by taxpayers, notably the *Brager* case, 124 Fed. (2d) 349. A mere casual reading of that case makes clear the conflict between that and the decision below. The facts are if anything stronger in favor of the present taxpayer. The Board concluded that the corporation here was a mere agent, the beneficial ownership being in Thompson. This, if correct, would subject the profit to taxation against the beneficial owner, not the agent, a mere fiduciary, even if there were no such ownership of stock of the agent-fiduciary by the beneficial owner of the land. Nevertheless (and in the face of this Court's many decisions

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[1] Page 20 of the respondent's brief in the Circuit Court of Appeals. A certified copy of this brief is on file with the Clerk of this Court in docket No. 552, *Interstate Transit Lines* v. *Commissioner*.

[2] A certified copy of this letter is also on file with the Clerk of this Court in docket No. 552, *Interstate Transit Lines* v. *Commissioner*. For convenience this letter is reproduced, as an appendix to this reply brief, *infra*.

on the subject of the binding effect of factual decisions of administrative tribunals of first instance[1], the Court below, because of the supposed effect of the language in *Higgins* v. *Smith*, rejected the Board's express conclusion that there was an agency and that the beneficial ownership was in Thompson. The Court below could not have held that as a matter of law the evidence did not support the Board's conclusion; for patently the evidence does support the Board. The only possible ground on which this reversal can be upheld is that, as a matter of law, a taxpayer may never invoke the "agency" doctrine, in cases of this kind. Respondent's present emphasis on the facts, and some inaccuracies of statement, make necessary some further reference to some of the evidentiary facts on which the Board based its conclusion.

1. Respondent treats Thompson as a free agent "to adopt such organization for his affairs as he may choose" (quoting, on Page 7, from *Higgins* v. *Smith*), and argues further (p. 8) that the taxpayer corporation "was created to carry out a business purpose" (protecting creditors' investments and saving Thompson's equity). Yet respondent concedes (*ibid*) that at first "Thompson had no control over it (the corporation." Respondent argues that to treat the corporation as a "dummy" would be to negate the very reason for which it was brought into being." Yet that purpose (which was not Thompson's but the bank's) had already been fully accomplished by 1933 when, as respondent says (*ibid*), Thompson had become "simply in the position of a person taking over the stock of a corporation already organized and functioning." The Board held that Thompson was the beneficial owner. The corporation (irrespective of stock ownership and while admittedly Thompson "had no control over it") never did more than hold the equity for Thompson's beneficial account. Thompson's acquisition of the stock, on the termination

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[1]Compare *Helvering* v. *Rankin*, 295 U. S. 133, 55 S. Ct. 732, 79 L. Ed. 1343

of the voting trust in 1933 (brief p. 8), did not, without more, suddenly transform the corporation into the beneficial owner. Thompson did not at any time "adopt" the corporate organization for his affairs, as respondent repeatedly suggests. The organization of the corporation was not "voluntary." It was forced on Thompson. After 1933 the corporation certainly was a "dummy," whatever was its status in this respect prior thereto. At most all the corporation had was the naked legal title, beneficial ownership being at all times in Thompson, subject for a time to creditors' claims.

2. Seeking to convey the impression that Thompson's present predicament results from his own voluntary choice, respondent suggests (brief p. 3) that the arrangement eventuated from someone's "proposal" (which term connotes freedom to accept or reject it); and respondent also, in this connection, emphasizes (brief p. 6) language of the Court below to the effect that Thompson had "voluntarily chosen to organize petitioner to conduct certain business affairs." The fact is that Thompson was in desperate financial circumstances, a necessitous debtor at the time the corporation was organized, and wholly without any power of free choice beyond the harsh alternative of surrendering his equity or bowing to the bank's demand. Although he owned considerable property (Rec. p. 52) he did not in other situations employ the corporate device in the transaction of his affairs (Rec. p. 42). The testimony on the subject of Thompson's supposed volition in the matter is to the effect (Rec. p. 36) that the Bank of Bay Biscayne would lend some money urgently required for back taxes, but that "they were not going to do it" unless Thompson "authorized the bank to form a corporation in which to place title" to the property, and that after such formation he would "have to hypothecate all of the stock of the corporation to secure the tax money loan" and have to give a voting trust to some officer of the bank "to vote all the stock of the corporation at any time they saw fit." Thompson authorized

the bank's officer to "go ahead and form the corporation" *(ibid)* and "signed whatever was brought up there" to his office. He testified that Moline Properties, Inc., "was purely a receptacle to hold the title to this property in order to get the bank to loan that money, take care of the taxes." This testimony is without contradiction, and its substance is embodied in the findings (Rec. p. 17). It completely negatives the assertedly "voluntary" choice of the corporate form. The bank, not Thompson, demanded the corporation; the bank organized it; Thompson had little or nothing to say beyond the alternative of submission, or loss of his equity; and now, after struggling to save what little he had, his submission, upon what any normal person would treat as a mere matter of form, to the demand of an exacting creditor, is, by a strange perversion of the realities, characterized as his "voluntary" choice in the "organization for his affairs," and seized upon as an excuse, under the guise of taxation, to mulct him of the little he has salvaged from the debacle.

3. How completely without independence Thompson was is well illustrated by the transaction, mentioned on page 5 of respondent's brief and in the Board's findings (on page 18 of the Record), whereby the corporation, as respondent says (p. 5), "purchased from Biscayne a note of Thompson's together with a real estate mortgage securing it, in the amount of $43,000, on which interest of $9703.14 was due, at its face value plus accrued interest," for which the corporation is said to have given "its note for the purchase price, securing it with Thompson's mortgage, which it received on the purchase of the note." This extraordinary and fraudulent transaction is fully explained in Thompson's testimony (Rec. p. 42 ff; see also exhibit 1, Rec. p. 71). The minutes purportedly authorizing the transaction (Exhibit 1, Rec. p. 71) were prepared by the bank's personnel and falsely recited Thompson's presence at the meeting. He was not there in fact (Rec. p. 43). The

transaction was "just some bank juggling" which "caused them all to be indicted" (Rec. p. 44). Thompson "never heard of that minute until all of these mortgages were liquidated" and the corporate records and minute book turned back to him (Rec. p. 43)[1].

4. In respondent's discussion of certain evidentiary facts (on pages 4 to 6 of his brief) he *omits* the following:

a. Thompson was personally obligated on the notes secured by the mortgage and "was never at any time relieved of liability on the mortgage, personal liability, because there never was any substitution of notes." (Rec. p. 38).

b. When the loan was negotiated with National Investment Holdings (brief p. 4) the checks representing the proceeds were made payable to Thompson (Rec. p. 40).

c. In the case of the suit to remove certain restriction, as to which respondent says (brief p. 5) that Thompson paid $4,005.39 *of* the expenses; the fact is that the Board found that Thompson had paid this amount in 1933 (Rec. p. 18); but the testimony also shows that the *entire* fee was paid by Thompson, that payments for Thompson's account were made by the bank to the lawyers; and that Thompson "was not even consulted about that" except that he had, before the corporation was formed, authorized the bringing of the suit and knew that fees would be charged against him (Rec. p. 41). The taxpayer corporation obviously

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[1] Thompson testified (Rec. pp. 44, 45): "I signed whatever the bank sent over there. I was obligated to the bank. If they drew a paper and sent it over there I signed it. I never asked any questions. I was not in a position to ask questions. It related to Moline Properties. They had a voting trust to do as they pleased, and I had confidence in everything that the bank was doing. But that is a pure bogus piece of shenanigan."

never paid any part whatever of these fees, for it never had any funds.

d. In the case of the condemnation suit (referred to on page 5 of respondent's brief) the testimony shows a reference to it in the false minutes of that meeting Thompson did not attend (Rec. p. 48), that there were condemnation proceedings, that the Clerk of Court handed Thompson as President of Moline Properties a check for $6,500 which was "sent over to the Beach Bank and turned over to one of Thompson's creditors" but that Thompson did not "want to be bound by that minute" but did know where the money went. (Rec. p. 48). The record owner of the title was necessarily the party to the condemnation suit[1]; a circumstance that in no way alters the fact that the agency-fiduciary relationship in fact existed, as the Board found.

e. All moneys received from sales and for the 1934 rental (brief p. 6) were received by Thompson and dealt with as his own, as he had a right to do, he having, as the Board held, the beneficial ownership. He testified (Rec. p. 45) that he received the money from the sales, which was deposited in his own bank account. It does not affirmatively appear from the record in whose account the rent money was deposited, but as the corporation had no account and Thompson had the beneficial ownership, it is a fair inference from the entire testimony that he also himself received this relatively small sum.

f. There is nothing in the record to suggest that Thompson conceived the formation of Moline Properties to fraudulently evade payment of taxes.

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[1]The corporation did not bring the suit; it was brought against it. (Rec. p. 55).

The very authorities cited by respondent emphasize the confusion in the law. The *Brager* case, 124 Fed. (2d) 349, is distinguished on the shadowy ground that the corporation there was "of a 'purely nominal character' which 'had no business activities and served no purpose other than the passive holding of the legal title' to property" (brief p. 10). That is the present case, especially after 1933. As to the period prior to 1933, Thompson's moral and equitable position here stands on a far stronger footing than that of the interested parties in the *Brager* case; for there they were under no compulsion and were indeed acting voluntarily in their own interest, while here Thompson did what an exacting creditor told him to do. The significance is not apparent of the shadowy additional distinction suggested (in the footnote on page 10 of respondent's brief), namely, that the corporation in the *Brager* case "did not assume the mortgage debt against the property transferred to it." Moline's nominal assumption of Thompson's personal obligation added nothing to that obligation, and was in pursuance of a formal arrangement dictated by the bank. The conflict between the present and the *Brager* case is too plain for further discussion.

But, says respondent (brief p. 10, footnote), "It is questionable whether the same result would have been reached by the Fourth Circuit in the *Brager* case if that case had been decided after the reversal of its decision in *Powell* v. *Gray*, 114 Fed. (2d) 752 (C.C.A. 4th), in which this Court, citing *Higgins* v. *Smith*, *supra*, stated (314 U. S. 402, 414): 'The choice of disregarding a deliberately chosen arrangement for conducting business affairs does not lie with the creator of the plan'." It does not follow, however, that if the "deliberately chosen" corporation, in cases of this kind, is in fact a mere agent or fiduciary, the taxpayer is precluded from showing such actual relationship. That is what the Fourth Circuit held, in effect, in the *Brager* case. If, for example, Thompson had conveyed the property to a

corporation trustee whose stock he did not own, no one would contend that that corporation, not having the beneficial ownership, should merely by virtue of its bare legal title be taxable on profits of the beneficial owner. That, however, is in effect the holding of the Court below; for it rejected the Board's conclusion that an agency existed, and that Thompson was the beneficial owner. Respondent's citation of this Court's decision in *Gray* v. *Powell*, 314 U. S. 402,62 S. Ct. 326, 6 L.Ed. Ad.Op. 285, overlooks the fact that that decision rests upon the controlling effect of the administrative determination of the tribunal of first instance that the railroad receiver was not the "producer." What was actually decided in *Gray v. Powell* requires a reversal of the Fifth Circuit decision below, and an affirmance of the Board of Tax Appeals.

Perhaps decisions "piercing the corporate veil" have confused the subject because of language to the general effect that courts will look through the corporate fiction where necessary in certain situations. As a matter of fact the result, at least in cases upholding the "agency" doctrine in a taxpayer's favor, can frequently be supported on the ground that the evidence shows an agency in fact, so that the corporation, though seemingly the principal actor, is but an agent, or fiduciary, for another. Stock ownership by the beneficially interested party may be merely one circumstance in a collection of evidentiary facts, all establishing agency. The significance of the economic interest of the stockholder in his corporation may sometimes obscure, or confuse, the essential fact, which is not whether stockholder and corporation are one, but whether the corporation is acting for itself or as agent for another. The present case is a particularly favorable one for clarification of the law; for here the Board's ultimate conclusion of fact, binding under this Court's decisions on appellate tribunals, is that there was an agency, in fact.

The decision below was a clear miscarriage of justice. It shocks the conscience when reviewed in the light of

the facts and the Board's findings. It should not be allowed to stand unless compelled by clear rules of law, which it obviously is not. The price of submission by a necessitous debtor to his creditor's compulsion, onerous enough at best, should not, especially under the high tax rates of these times, include what is in reality confiscation by the tax collector. The high tax rates of the past few years make it more than ever necessary that realities only be considered and that true income only be taxed and to the person to whom it beneficially accrues. Otherwise the tax laws, complicated and burdensome at best, will be mere traps for the unwary, who, like Judge Thompson, know "nothing about income tax law" (Rec. p. 45), while those able to employ skilled advisors may avoid such pitfalls, and even escape taxes that should in fairness be paid. It is earnestly submitted that this case is therefore peculiarly appropriate for review by this Court, to the end that the confusion in the law be clarified.

Respectfully submitted.

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Attorneys for Petitioner.

THOS. H. ANDERSON,
BART A. RILEY,
H. H. EYLES,

Attorneys for Petitioner.

APPENDIX A

Copy of Attorney General's letter to Clerk of the Circuit Court of Appeals for the Fifth Circuit in response to taxpayer's petition for rehearing filed herein November 28, 1942, is as follows:

"SOC
5-7069 BMB:fs

December 7, 1942

Oakley F. Dodd, Clerk

United States Circuit Court of Appeals
for the Fifth Circuit,

New Orleans, Louisiana

Re: *Commissioner v. Moline Properties,*
Inc., No. 10279

Sir:

A copy of the taxpayer's petition for rehearing, filed on November 28, 1942, has been received. Because the matters therein stated were fully discussed in the briefs of the parties and in the argument before the Court, and add nothing new to be considered, this office does not propose, unless request should be made by the Court, to file a formal reply.

The substance of the petition appears to be that this Court has unjustifiably reversed a decision of the Board on a question of fact. Actually, however, the decision of this Court was that the Board had erred in its application of legal principles to the facts before it. The taxpayer also complains (Pet. 4) that there is nothing in the record or the Board's findings to show that the form employed for doing business was unreal or a sham. Presumably, the absence of such evidence and such a finding

tends to sustain the Commissioner's position. The question here was not whether a given transaction, such as a sale from a stockholder to his corporation, was a reality or a sham, but whether a voluntarily-selected form for carrying on a business could be disavowed when a tax saving might result.

Respectfully,

For the Attorney General,

Samuel O. Clark, Jr.,

Assistant Attorney General."

CC: R. H. Eyles,
Seybold Building,
Miami, Florida

Douglas D. Felix,
Congress Building,
Miami, Florida

APPENDIX B

The Prentice Hall organization, one of the two standard recognized "services" on the subject of taxation, had the following comment in a recent "What's Happening" release (of November 28, 1942):

"DISREGARDING CORPORATE ENTITY

Can the corporate form be disregarded in determining tax consequences of operations of property held by corporation? Question often arises in connection with "dummy" real estate corporations. Sole stockholder claims he and corporation are one and the same. Hence, he argues, no tax should be imposed on corporation; its income or loss should be treated as his individual income or loss.

BTA has upheld argument in many cases. Recently, Fourth Circuit rules likewise in a well considered opinion (*U. S.* v. *Brager*, 124 Fed. (2d) 349). More recently, Second and Fifth Circuits have held to the contrary: *Watson* case from 2nd Circuit (124 Fed. (2d) 437), holding sole stockholder could not deduct corporation's operating loss; *Moline* case from 5th Circuit (11/7/42) holding income taxable to corporation and not to its sole stockholder.

OBSERVATION 1. Conflict among Circuits indicates possibility that question may be settled soon by Supreme Court. Meanwhile those concerned (both stockholder and corporation) should take appropriate steps to insure refunds in event of favorable decision.

OBSERVATION 2. It is settled that the *government* may disregard the corporate entity when used to commit fraud, or for tax evasion purposes (*Higgins* v. *Smith*, 308 U. S. 473)."

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 660

MOLINE PROPERTIES, INC.,
Petitioner.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Writ of Ceritorari to the United States Circuit Court of Appeals for the Fifth Circuit.

PETITIONER'S BRIEF

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SUPREME COURT OF THE UNITED STATES

No. 660

MOLINE PROPERTIES, INC.,
Petitioner,
v.
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Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

PETITIONER'S BRIEF

To the Honorable the Chief Justice and Associate Justices of the United States Supreme Court:

OPINIONS BELOW

The opinions of the Board of Tax Appeals is reported at 45 B. T. A. 647 (Rec. p. 19). The opinion of the Circuit Court of Appeals is reported at 131 Fed. (2d) 388, (Rec p. 89).

JURISDICTION

This case is here upon a writ of certiorari, which was granted March 8, 1943, to review the decision of the Circuit Court of Appeals for the Fifth Circuit, en-

tered on November 7, 1942, in an income tax case involving the taxable years of 1935 and 1936, in which the Board of Tax Appeals held that respondent had erred in determining deficiencies and penalties for 1935 and 1936, against petitioner. The Circuit Court of Appeals reversed the Board's decision. The jurisdiction of this Court is sustained by Section 240 of the Judicial Code, as amended (U. S. Code, Title 28, Section 347), and by Section 1141 of the Internal Revenue Code (U. S. Code, Title 26, Section 1141). The Circuit Court of Appeals had jurisdiction under the second of these sections, namely, Section 1141.

STATEMENT OF THE CASE

Respondent asserted deficiencies against petitioner for 1935 and 1936 in the amount of $4,993.92 of income taxes and $4344.95 of excess profits taxes, plus a delinquency penalty for 1936 of $788.35. The Board's decision setting aside respondent's determination (Rec. p. 22), was reversed by the court below (Rec. p. 89; 131 Fed. [2d] 388). The correctness of the decision below turns upon the question whether, as a matter of law, certain income from the sale of four lots of real estate in Miami Beach, Florida, was petitioner's income or that of its sole stockholder, Uly O. Thompson. That question in turn depends upon whether the petitioner (herein sometimes referred to as "Moline") was Thompson's agent, or stood in a fiduciary capacity to Thompson; or, stated differently, whether the Board's determination that Thompson was the beneficial owner of the lots and, therefore, that gain from their sale was not taxable to Moline, was erroneous as a matter of law.

Thompson, a Circuit Judge of a Florida state circuit court until comparatively recently, was also a large holder of other Miami Beach, and Miami real estate, title to all of which was in his name individually (Rec. p. 19; 52), except the four lots involved in this case. These,

which were acquired on August 17, 1920 (Rec. p. 17), were mortgaged by Thompson, in 1923, to one William F. Whitman for a debt of $20,000; and in 1936 they were subjected to a second mortgage given by Thompson to the Miami Beach Bank and Trust Co. (herein referred to as "Beach Bank") to secure an additional indebtedness of $20,000 (*ibid*) already existing, which was owing to that bank (Rec. p. 35). This land did not, however, prove profitable. In 1928 back taxes on the lots amounted to $6,500 (*ibid*). The second mortgagee insisted that these taxes be paid. At the time Thompson was very hard pressed for money. The president of the Bank of Bay Biscayne, Miami, (herein referred to as "Biscayne"), parent bank of the "Beach Bank," one Gilman (Rec. p. 36), called Thompson in and told him "he would have to do something about it (the taxes) or they would have to foreclose the mortgage," and that if he, Thompson, would let the bank organize a corporation, and transfer the property to the corporation, Biscayne would loan him sufficient money to pay the taxes (Rec. pp. 33, 36). Gillman was president of Biscayne, the parent Bank, and virtually controlled the Beach Bank, a subsidiary of Biscayne. Thompson was told, however, that the bank would not lend him the money unless he authorized the bank to form the corporation in which to place title to the property, and that when the corporation was formed he would have to hypothecate the stock to Biscayne to secure the tax money loan, and would have to give a voting trust to some bank officer to vote all of the stock at any time they saw fit (Rec. p. 36).

Thompson agreed (Rec. pp. 33, 36), and the bank had its attorneys organize the corporation (Rec. p. 33). The first minutes and corporate papers were brought to Thompson's office, and he signed them (Rec. p. 36). He testified, without contradiction, that that was the way the corporation Moline (the petitioner herein) was formed, and that "it was purely a receptacle to hold the title to this property in order to get the bank

to loan that money, to take care of the taxes." (Rec. p. 37) The stock was issued to Thompson, and it was turned over to Biscayne, and the voting trust was created in favor of that bank (Rec. p. 37). Moline assumed the two mortgages to Whitman and the Beach Bank (Rec. p. 37), but Thompson was never relieved of personal liability, and remained liable on both (Rec. p. 37). The reason for the assumption by the corporation, Moline, of these mortgages was explained as being the bank's insistence on the privilege of the right to apply all proceeds from the sale of the collateral to the liquidation of the two moragages (Rec. p. 38).

Biscayne closed in 1930 and its powers under the voting trust were thereafter exercised by the liquidator of the bank (Rec. p. 18). The general arrangement made in 1928, as already outlined, continued until 1933, when Thompson managed to raise the funds necessary to obtain a discharge of the obligations to the banks. Neither during this period, nor subsequently, did Moline ever keep any books of account or maintain a bank account at any time during its existence (Rec. p. 19). It never owned any assets except the four lots in question. It never had any office, place of business or employees, and except as herein stated it never transacted any business. It paid no salaries.

While the above arrangement was in effect, Thompson continued subject to Biscayne's dictation. Three matters referred to in the findings, belonging to this period, bear somewhat upon the question of the agency-fiduciary status of Moline which the Board found to exist, and incidentally illustrate Thompson's complete subserviency to the bank.

The first of these was a suit, brought in Moline's name, but at the bank's insistence and direction, to remove certain restrictions imposed by a prior deed on the land. Thompson was not even consulted about the matter (Rec. p. 41); but he did, before Moline was

formed, authorize bringing the suit (*ibid*). Expenses which included a fee of $5,000 which the bank agreed to pay the lawyers (*ibid*), Thompson knew would be charged against him (*ibid*). He made payments to that firm from time to time, beginning in 1933, and the bank also made some payments for his account (*ibid*). The Board included in its findings a recital that in 1933 he had personally paid $4,005.39 in this connection (Rec. p. 18). No part of these fees were paid by Moline, for it never had any funds.

The second of the transactions to which the findings refer is one of October 1, 1929, whereby Moline appeared to have purchased from Biscayne a note of Thompson's in the sum of $43000.00 on which interest of $9703.14 was due, in consideration of Moline's note for the purchase money, securing it with Thompson's mortgage (Rec. p. 18). This transaction, which was fraudulently procured at the instance, apparently, of questionable juggling of Biscayne's affairs by some of its bank officials (Rec. pp. 42 ff), was covered by minutes (Exhibit 1, Rec. p. 71; p. 42) prepared by the bank's personnel, which falsely recited Thompson's presence at the meeting, although he was not there in fact (Rec. p. 43). This or similar transactions appear to have caused the bank officials to be indicted (Rec. p. 44). It is not of great importance to the present case; but it illustrates the bank's control of the petitioner and Thompson's lack of independent volition.

The remaining matter referred to in the findings relates to certain condemnation proceedings during the same period, in which Moline, as record owner of the land, was a nominal party defendant. In connection with these proceedings Thompson, as President of Moline, was handed a check for $6500, which was sent over to the Beach Bank and may have been turned over to one of Thompson's creditors (Rec. p. 48). A reference to this matter appears in the false minutes already mentioned, but Thompson said he would not

want to be bound by that minute and did not know where the money went (Rec. p. 48).

All the encumbrances on these lots were liquidated on July 29, 1933, with funds obtained by a loan negotiated by Thompson with the National Investment Holdings, Inc., secured by a mortgage on part of the property in question (Rec. p. 18). Checks representing proceeds of this mortgage to National Holdings were made payable to Thompson (Rec. p. 40). This new debt was repaid in 1936 through the sale of property. After the debts due the bank were liquidated, the stock control of Moline was returned to Thompson.

After 1933 and until the sale of the lots, the only other matter bearing upon the present case was a lease, in 1934, of a part of the real estate for a parking lot, from which $1,000 was received (Rec. p. 19). Although it does not affirmatively appear from the record in whose account this rent money was deposited, it is, especially in view of the Board's general conclusion that Thompson was the beneficial owner, a fair inference from the fact that Moline had no account and from the entire testimony, that this relatively small sum was collected by Thompson personally.

In 1934, 1935 and 1936 the lots were sold in three separate parcels. The income sought to be taxed to Moline consists of the profit from the 1935 and 1936 sales. The proceeds were received by Thompson and deposited in his own bank account (Rec. pp. 19, 45).

Thompson, who knew nothing about income taxes and never made out a return in his life ,and whose salary as a state judicial officer during this period was not subjected to federal income taxation, employed an auditor to make out his returns (Rec. p. 45). The 1934 and 1935 sales were reported by the corporation, the present petitioner, in a corporation tax return, erroneously under the decision herein by the Board of

Tax Appeals. In 1936 Thompson's auditor learned of the Board's decision in the *Forshay* case, 20 B. T. A. 537 (Rec. p. 56), and suggested to Thompson that Moline was but a "dummy" corporation (*ibid*); and on his advice a refund claim was filed for 1935, and, on December 2, 1938, a delinquent personal return was filed in which Thompson reported the 1935 gain as his individual gain (Rec. p. 19). The 1936 sales were reported by Thompson personally, no return being filed by Moline for that year. The Commissioner assessed an additional tax for 1935 (on grounds not here material), assessed a deficiency for 1936 against Moline, and assessed against it the statutory delinquency penalty. Both these deficiencies, and the penalty, are bottomed on the formal separate entity of Moline, and the premise that the gain was not Thompson's but Moline's gain.

There is not the slightest suggestion that the corporation was formed for tax avoidance purposes, nor to protect Thompson against his personal liabilities. On the contrary, Thompson's personal obligation continued at all time, and, when Moline was organized, possible tax problems appear not to have been considered at all.

The Board of Tax Appeals, basing its decision squarely on the facts (Rec. p. 20), concluded that Thompson was the beneficial owner of the lots, and entered a decision of no deficiency (Rec. p. 21). The Circuit Court of Appeals reversed. It is the latter decision which is here for review.

SPECIFICATION OF ERRORS

The Court below erred in the following respects:

1. In holding that the employment of the corporate form was at Thompson's election.

2. In treating Thompson as estopped to assert that petitioner was a mere "dummy" corporation.

3. In failing to hold that on the facts petitioner was a mere agent, or fiduciary for Thompson, the beneficial owner.

4. In failing to uphold the Board's factual determination that Thompson was the beneficial owner of the lots.

5. In failing to uphold the Board's factual determination that the gain from the sale of the lots was not that of the petitoner, Moline.

6. In holding that as a matter of law the gains were taxable to Moline.

7. In reversing the decision of the Board of Tax Appeals in favor of petitioner.

ARGUMENT

QUESTION PRESENTED

The specific question for determination on the present record is whether as a matter of law the gain from the sale of real estate, title to which was in Moline's name, is taxable to Moline or to Moline's sole taxpayer and stockholder, Thompson, whom the Board found to be the beneficial owner of the real estate sold. Stated differently, and in the language of the petition herein (Petition, p. 6), the question is whether Moline, and Thompson, are estopped, as a matter of law, from asserting disregard of the corporate entity, and that Moline should be treated as a mere agency or instrumentality, and ignored for taxation purposes.

STATUTES INVOLVED

The statutes involved, set out, *infra*, in the appendix, are:

> Section 13(a), and 52 of the Revenue Act of 1934, ch. 277, 48 Stat. L. 680, and Sections 13(b), 22(a), and 52 of the Revenue Act of 1936, ch. 690, 49 Stat. L. 1648.

SUMMARY OF ARGUMENT

A corporation, although not *ipso facto*, an agent for its stockholders, may nevertheless be in fact such an agent; and where the facts evidence such agency, it should for tax purposes be treated as an agent, just as in any agency situation, even though its principal is a stockholder, or sole stockholder.

The Board of Tax Appeals has on numerous occasions, where the facts are like those of the present case, treated the corporation as "a mere figmentary agent" which should be "disregarded" for tax purposes. Whether in such cases (some of which are summarized in the argument) the corporate entity is to be considered as "disregarded," or the corporation's existence is to be "regarded" but the corporation recognized as being the agent which it is in fact, the result in such cases is sound, compels the taxation of income to him whose income it is, and precludes taxation of income to a party not beneficially the owner of it.

The opinion below summarily rejects the principle applied by the Board, that where a corporate agency for a stockholder is, on facts such as are here present, found to exist, income should be taxed to the beneficial owner. In so doing the court below misconceived the effect of this Court's decision in *Higgins v. Smith*, and followed the Eighth Circuit's erroneous application of that decision in the *Interstate Transit Lines* case.

In the present case the individual principally interested in the result is not, in order to avoid the tax consequences of his own chosen methods of business organization, disavowing that organization. What is claimed is that, in the absence of some other element of estoppel, an agency relationship shown by the present record to be actually existing be given effect for tax purposes, just as would be done in the case of corporate agency where the principal is not a sole or controlling stockholder.

The Board of Tax Appeals treated the facts proved in the present record as establishing an agency with respect to real estate beneficially owned by the sole stockholder. This factual conclusion not only was wrong as a matter of law, but was the only factual conclusion possible under the evidence, unless, as a matter of law, there is an estoppel against claiming that such evidence establishes the existence of the agency relationship. There is no such estoppel. Giving effect to the relationship accords with realities, and results in taxing the income to the party beneficially entitled to it.

The decision in *Higgins v. Smith* was one in which a tax payer was not permitted for tax purposes, to avail himself of his own corporate creature, which he himself created and used in other situations for tax avoidance. There was a jury verdict adverse to the taxpayer, not, as here, a favorable factual determination by the trier of the facts. The dicta relied on as overthrowing the line of authorities supporting the present petitioner's position merely declare that the tax disadvantages of the corporate form of conducting business cannot be disavowed by one who has deliberatly chosen that form. The dicta did not, however, make a change in the law of trusts or of agency, or preclude claiming that the corporate creature is in fact an agent if such is the fact.

The court below has in effect reversed the Board of Tax Appeals on a fact determination amply supported by the record, and has done so because it ignored or overrode, without challenging, finding of fact by the Board, and because of a misconception of the effect of the decision in *Higgins v. Smith*. Its decision should therefore be reversed, and the Board's decision reinstated.

I.

A CORPORATION EXISTING MERELY TO HOLD TITLE TO REAL ESTATE, WHICH IS IN FACT BUT A MERE AGENT OR FIDUCIARY FOR ITS STOCKHOLDER, WHO IS THE BENEFICIAL OWNER, SHOULD BE SO TREATED FOR TAX PURPOSES, AS IN THE CASE OF ANY AGENCY.

Until the recent decision of this Court in *Higgins v. Smith*, 308 U. S. 473, 60 S. Ct., 355, 84 L. Ed. 406, it had been frequently held that a corporation which, to borrow the Board's language in its opinion in the present case, exists merely to facilitate the passage of title to real estate, whose stockholders act without regard for its entity, is a "mere figmentary agent which should be disregarded in the assessment of taxes taxes." Perhaps it is not strictly accurate to refer to the result in such cases as one which "disregards" the entity. The separate entity is in a sense respected but recognized for what it is, a mere agent or fiduciary, and therefore the same tax consequences follow as in the case of any corporate agent or fiduciary, whether or not acting for the owners of its stock. Whether this a characterized as "disregarding" the entity or amounts merely to viewing the entity in its proper perspective, and giving it its true significance as a mere agent, is not important so far as the result is concerned. The latter concept, that the entity constitutes a mere agent, does no violence to the elementary rule of the separate fictional existence of the corporation. Language used in the decisions sometimes is to the effect that the separate entity may in some

circumstances be "disregarded," sometimes terms the subsidiary entity as an "agent," and sometimes suggests a confusion of both concepts.

A corporation is, of course, not *ipso facto*, the agent of its stockholders. It is a separate entity. But a corporation which is acting as agent for a stockholder, even a sole stockholder, is note the less an agent, even if its principel happens also to be its sockholder. While the fact of stock ownership, standing alone, does not create the relation of agency, yet the reverse is also true. The fact of stock ownership does not, *ipso facto*, negative the agency relationship.

Summary of some Board decisions in dummy corporation cases.

Some Board decisions, cited in its opinion in the present case, afford practical examples of "dummy" corporations that in fact were agents, and were so treated for tax purposes. These cases are recognized as not binding here, but are referred to as supporting the present petitioner's contention, and as illustrating a correct application of the law to similar factual situations.

In the present case the Board, saying (Rec. p. 21) that it had "frequently" regarded a corporation that is a mere holder of title as "a mere figmentary agent," "disregarding" the entity "to effect a more realistic assessment of taxes" (Rec. p. 21), cited five of its own prior decisions, one of which was the subject of an appeal which was upheld. These are:

Stewart Forshay, 20 B. T. A., 537.

J. A. McInerney, 29 B. T. A. 1. affirmed 82 Fed. (2d) 665.

Thrift Realty Co., 29 B. T. A. 545.

Mark A. Mayer, 36 B. T. A. 117.

Abram's Sons Realty Corporation, 40 B. T. A. 653.

The *Forshay* case, referred to in the record as the decision which occasioned Thompson's auditor to suggest that Moline was but a "dummy," was one in which persons interested in a corporation which owned an apartment building in New York City changed the form of the enterprise and created a new corporation to hold the property, which, instead of operating the enterprise as had the former corporation, would merely hold title for the benefit of "the persons in interest." Provision was made, in the instruments embodying the entire arrangement, that earnings would be distributed in fixed amounts annually, and for the distribution of the proceeds upon a sale of the property. These and other features of the arrangement (which was "voluntary" in the real sense, not as here an arrangement imposed by a creditor upon a debtor) were regarded by the Board of Tax Appeals as making it evident that the corporation did not take title on its own behalf or for its own benefit, but for that of the parties in interest. After referring to and quoting from certain New York statutes on the subject of Trusts, and saying that it made no difference whether a passive trust, a power in trust, or a mere agency was created, the Board concluded that in either case no estate or interest vested in the corporation, but the parties in interest took both legal and equitable title. Any income therefrom was that of the latter, not of the corporation.

In the *McInerney* case, the Board and Circuit Court of Appeals for the Sixth Circuit treated a similar corporate entity, which was, on the facts, a mere conduit for passing title, as of no effect to enable the taxpayer to avoid the consequences that payment by the purchaser for property thus transmitted was constructively received by the stockholder.

In the *Thrift Realty Co.* case, the Board on considerably stronger facts in favor of the taxing officers than those of the present case treated a similar corporation as a mere trustee for stockholders at the time certain real estate standing in its name was sold, and said in this connection that the fact that the taxpayer was a corporation in which the individuals affected owned all the stock "does not affect the status of agency."

In the *Mayer* case the Board delt with the question whether the net loss of a partnership should include income and deductions of a corporation whose stock was all owned by the partnership. The latter owned considerable real estate which it used in its regular business. Long before the income tax laws were passed it had organized a corporation for the sole purpose of holding title to the real estate which was transferred to the corporation. Title to real estate thereafter acquired was taken in the corporation's name. Otherwise the corporation transacted no business. It kept no books, and never had an office, employees, agents or a bank account. Receipts were collected by the partnership and expenses were paid by it, and it dealt with the lands as if it, not the corporation, held legal title. The purpose of organizing the corporation and continuing its existence was for convenience in handling property, including conveying title, and avoidance of title complications in case of a partner's death. The Board, after recting that ordinarily corporations have a separate existence apart from their stockholders, yet recognized that it, and the courts, had looked through the form and regarded substance "where the facts were peculiar," for which proposition there were cited, among other cases, this Court's decision in *Southern Pacific v. Lowe,* 247 U. S. 330, 38 S. Ct. 340, 62 L. Ed. 1142, and *Gulf Oil Corporation v. Lewellyn,* 248 U. S. 71, 39 S. Ct. 35, 63 L. Ed. 133. Upon a consideration of the facts the Board concluded that the partnership, not the corporation,

was the beneficial owner of the land, and that therefore receipts and disbursements were the partnership's, not the corporation's.

The *Abram's Sons* case resembled the present one in that the corporation was organized at the demand of creditors, to hold record title to certain real estate, and to receive, for creditor interests, the proceeds of a condemnation proceeding. Unlike the present case, the equity owners realized nothing after application of the proceeds. The Board treated the corporation as a mere trustee or agent to dispose of the property and act as a conduit and distribute the proceeds for creditors. Under these circumstances and on the authority of the *Forshay* case and other Board cases, the gain was held not taxable to the corporation.

The above cases were, it is submitted, correctly decided, and their reasoning and logic were correctly applied by the Board in the present proceeding (Rec. p. 11). To borrow the Board's reasoning in another Board decision, *Carling Holding Corp.*, 41 B. T. A. 493, if the contest were between the corporation (in this case, Moline, the petitioner herein) and those for whom it was acting, instead of a tax case, neither the corporation, nor the voting trustee, nor the Biscayne, could have contended that any profit belonged, as against Thompson, to Moline; for, in the Board's language, so to hold "would be a travesty upon the law of agency or trusteeship." 41 B. T. A. 493, at p. 503.

There are other decisions to the same effect, some of which are cited in the Board's opinions in the cases just mentioned. These cases properly insisted that income should be taxed to the party who or which is beneficially interested in such income, not to a mere formal holder of the title to property from which the income is derived, or to a mere agent or fiduciary not in fact beneficially interested. Such appears to have

been the generally accepted rule in cases of this kind.

The opinion below appears to be the first case involving such a fact situation in which a corporation holder of formal title to real estate which is a mere shell, or "figmentary agent," has been held taxable on income or gain from property where the beneficial interest is in the stockholder.

II.

THE OPINION BELOW IN EFFECT HOLDS, CONTRARY TO THE MANY DECISIONS IN SIMILAR CASES, THAN AN ESTOPPEL EXISTS AGAINST ASSERTING, IN A TAXPAYER'S FAVOR, THAT A CORPORATION IS IN FACT BUT AN AGENT FOR ITS STOCKHOLDERS. THIS HOLDING IS UNWARRANTED, ESPECIALLY IN THE FACE OF THE BOARD'S CONCLUSION THAT THE BENEFICIAL INTEREST WAS IN THE STOCKHOLDER.

The opinion below, ignoring or misconceiving the testimony, treats this subject summarily, on the supposed authority of *Higgins v. Smith*, and of the *Interstate Transit Lines* decision by the Eighth Circuit, now on review in this court.

The opinion of the court below is an example of the extreme in oversimplification. After reciting the facts, the bare assertion is made that the Board "erred in its decision." The general rule is cited that a corporation and its stockholders are for purposes of taxation different entities; and then the Board's findings and conclusions of fact, (abundantly supported by the record, which could permit of no other findings or conclusions of fact), and its opinion, were disposed of in five short sentences (Rec. p. 91; 131 Fed (2d) 388 at p. 389). It is declared that Thompson "for reasons satisfactory to himself and his creditors elected to employ a corporation" (thus ignoring the complete lack of any real volition or freedom on Thompson's part, and, in spite of the abundant evidence to the contrary, treating Thompson as having a free choice in the mat-

ter, when his only choice was surrender to the creditor's demand or loss of his property); and then, upon the postulate that Thompson had "chosen the corporate form to conduct these affairs," the opinion says that both he and the corporation "must accept the tax disadvantages," and "may not now, in order to escape corporate taxes, be heard to disavow the corporate existence and allege that the respondent (in the court below, petitioner here) was merely a "dummy corporation."

Not a word is said concerning the legal consequences of the Board's conclusion that it was Thompson who had beneficial ownership. Thus is it in effect declared that an estoppel existed against proving that the corporation was in fact but an agent, although in any other situation where the relationship of agency exists there would be no doubt that gain would be taxed to the beneficially interested party, not to the agent.

For this remarkable and, we submit, clearly erroneous pronouncement, at least as applied to the facts proved of record and found by the Board, the court below cited two authorities, this Court's decision in *Higgins v. Smith*, 308 U. S. 473, 60 S. Ct. 355, 84 L. Ed. 406, and the Eighth Circuit's decision in *Interstate Transit Lines v. Commissioner*, 130 Fed. (2d) 136. The *Interstate Transit Lines* opinion and the opinion below both overlook the significance of the fact of agency.

The *Interstate Transit Lines* opinion, after referring to *Southern Pacific v. Lowe*, 247 U. S. 330, 38 S. Ct. 540, 62 L. Ed. 1142, and *Gulf Oil Corporation v. Lewellyn*, 248 U. S. 71, 39 S. Ct. 35, 63 L. Ed. 133, and some Circuit Court of Appeals decisions cited by the taxpayer in that case in support of the "agency" contention, says (130 Fed. [2d] 136 at p. 140) that these cases "cannot be regarded as laying down any general rule authorizing disregard of corporate entity in respect of

taxation," for which assertion *Burnet v. Commonwealth Improvement Corp.*, 287 U. S. 415, 53 S. Ct. 198, 77 L. Ed. 399, is cited. The Eighth Circuit opinion then cites *Higgins v. Smith*, from which is quoted the dictum that "a taxpayer is free to adopt such organization for his affairs as he may choose and having elected to do some business as a corporation, he must accept the disadvantages," but that the Government "may sustain or disregard the effect of the fiction as best serves the purpose of the tax statute."

The quoted language, for which presumably the Court below in the present case cited the *Interstate Transit Lines* case, loses sight of the fact that the taxpayer in a proper case of this kind is not contending that he should be relieved of the consequences of his own chosen method of doing business. He is asking that the fact of the agency relationship be recognized and that the usual consequences of that relationship be given effect. This oversight may be a result of some of the loose language that has appeared in the books to the general effect that in certain situations "the corporate entity will be disregarded." Whether or not the "dummy corporation's" fictional entity be "disregarded," the same result should follow that would follow in the case of an actual agency where the principal is not the agent's stockholder. Unless there be some other element of estoppel present, ownership of corporate stock does not estop the owner from establishing an agency relationship, if such in fact exists. Authorities where the "agency" doctrine has been applied have treated facts like those here presented as evidencing agency.

Because the brief in the *Interstate Transit Lines* case now pending in this Court (Docket No. 552) discuss the holdings of this Court in *Southern Pacific Co. v. Lowe*, 242 U. S. 330, 38 S. Ct. 540, 62 L. Ed. 1142, and *Gulf Oil Corporation v. Lewellyn*, 248 U. S. 71, 39 S. Ct. 35, 63 L. Ed. 133, and also *Burnet v. Common-*

wealth Improvement Corp., 287 U. S. 415, 53 S. Ct. 198, 77 L. Ed. 399 (which is plainly distinguishable), the present petitioner will omit discussion of these autthorities. The discussion of them in the petitioner's brief in the *Interstate Transit Lines* case (No. 552 on this Court's docket) is adopted in this petitioner's behalf.

The Board of Tax Appeals' factual determination in the present case has ample evidence to support it, and the Board properly concluded that the gain was not Moline's but was Thompson's.

The Board of Tax Appeals treated the facts proved in this case as establishing the "agency" of Moline in respect of property beneficially owned by Thompson. It is submitted that the Board's factual conclusions were the only ones possible under the uncontradicted testimony in the present record, and that a contrary conclusion would have constituted an error of law, and would have been without any evidence to support it; but however that may be, the Board did find that Thompson, not the corporation taxpayer, the present petitioner, was the beneficial owner. The Court below, rejecting this conclusion, or at any rate ignoring it, has either: decided that as a matter of law it can never be concluded that such facts as here exist establish a corporation's agency for its sole stockholder, so that in effect there is an estoppel against claiming the benefit of the true relationship; or, has, in spite of this Court's many pronouncements on the subject, disturbed, without direct challenge of the correctness thereof, a factual determination of the Board, abundantly supported by the evidence, and has done so under the guise of a holding that the Board has erred in applying the law.

Thompson owned other extensive real property in Miami (19), from which circumstance it may be inferred that he was engaged generally in the business

of dealing in real estate. He did not, however, employ the corporate form in the handling of this business. Had he in effect operated the business of dealing in real estate through the medium of a corporation actually and actively conducting the business, then the ownership of all the stock would not, without more, have made has corporation's gain his gain. As applied to situation like that, it may be correct to say that a taxpayer thus conducting his affairs must accept the tax disadvantages. That is not the present case. Thompson, at a creditor's insistence and demand, acquiesced in the use of a corporation to hold title to some of his real estate. The instigator of the organization of the corporation was the bank, not Thompson. It was the bank's, not his, purpose that was served, aside from the fact that he thereby avoided the harsh alternative of loss of the property. After he regained control, in 1933, he did not, it is true, immediately dissolve the corporation or transfer record title back to himself but he dealt with the property as his own. He had no purpose of tax avoidance. (Indeed, the contrary is the case, as the present proceeding demonstrates.) His and the corporation's non-action with respect to the record title did not change the fiduciary relationship which the Board determined to have existed, under which Moline, the record owner, merely held title for Thompson, the beneficial owner. If he was the beneficial owner then it follows that Moline was a fiduciary. Whether Moline be termed "fiduciary" or "agent" is not important. What is important is that the property, and therefore the gain from its sale, was not Moline's, any more than in the case of a sale by any agent or fiduciary of his principal's or his beneficiary's property.

III.

THE DECISION OF THIS COURT IN HIGGINS V. SMITH HAS NOT CHANGED THE LAW CONCERNING THE AGENCY DOCTRINE, AND, INSTEAD OF REQUIRING REJECTION OF THAT DOCTRINE WHEN INVOKED IN A CASE LIKE THE PRESENT, SUPPORTS THE OPPOSITE RESULT.

The Court below, and the Eighth Circuit Court of Appeals[1] in the *Interstate Transit Line* case, have treated this Court's well known decision in *Higgins v. Smith*, 308 U. S. 473, 60 S. Ct. 355, 84 L. Ed. 406, as in effect holding that the Government, in a tax case, may at will "disregard" the corporate entity, while the taxpayer may under no circumstances assert the existence of an agency relationship. If these courts are right in thus construing *Higgins v. Smith*, the one sided situation thus resulting respresents a somewhat startling change in what has heretofore been generally assumed to be the law applicable to these cases.

In that case Smith sued Higgins, the Collector of Internal Revenue, for a refund of taxes. The question was whether the taxpayer was entitled to deduct a loss arising from the purported sale of securities by him to his wholly owned corporation. Officers and Directors of the corporation were Smith's subordinates. Its transactions were carried on under his direction and were largely restricted to operations in buying securities from or selling them to the taxpayer. This Court, in the opinion, termed the corporation Smith's "corporate self." It was created to gain income and estate tax savings for Smith, and thus was an attempted tax avoidance device. Under these circumstances this Court held that the Second Circuit Court of Appeals had erred in

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1. That court's recent decision in *Palcar Real Estate Co. v. Commissioner*, 131 Fed. (2d) 210, is clearly distinguishable on the facts from the present case, and contains language apparently recognizing the difference between an active corporation and "a mere passive holder of the title." The case does, however, regard the language of *Higgins v. Smith* as did the court below.

reversing and remanding a District Court judgment, rendered pursuant to a jury verdict, in favor of the Collector. The trial court gave an instruction, which this Court approved, that the jury were to find whether the sales by Smith to the corporation, out of which grew the asserted loss, were actual transfers of property out of Smith into something that existed separate and apart from him, or to be regarded as simply a transfer by Smith's left hand "being his individual hand, into his right hand, being his corporate hand, so that in truth and fact there was no transfer at all." The jury took the latter view and brought in a verdict for the Collector. This Court not only said there was sufficient evidence to sustain the verdict. The opinion goes further and adds that "this domination and control is so obvious in a wholly owned corporation as to require a peremptory instruction that no loss in the statutory sense could occur upon a sale by a taxpayer to such an entity."

It was said that "there is not enough of substance in such a sale finally to determine a loss." Stated in another way, it may be said that after the transaction in question Smith was neither richer nor pooer than he had been before.

The opinion refers to what is termed "the natural conclusion that transactions, which do not vary, control or change the flow of economic benefits, are to be dismissed from consideration." That in effect states one contention of the present petitioner; for, in the succeeding language of the opinion, "the purpose here is to tax earnings and profits less expenses and losses," but "if one or the other factor in any calculation is unreal, it distorts the liability of the particular taxpayer to the *detriment or advantage* of the entire tax-paying group. (Italic ours.) If an "unreal" factor can work to the "advantage of the entire tax-paying group" it is because the particular taxpayer is overtaxed as a result of the "unreal" factor. That is the situation here.

It is "unreal" to treat Moline as the owner of the lots. If a taxpayer is not permitted to show the fact of such "unreality," then the word "advantage" in the *Higgins v. Smith* opinion is meaningless. The reference to "detriment or advantage" negatives the view that a one-sided rule was being announced.

The opinion then refers to *Burnet v. Commonwealth Improvement Co.*, 287 U. S., 415, 53 S. Ct. 198, 77 L. Ed. 399, which had been cited by Smith in support of his contention. That case involved the converse situation; but in that case there was also an element of tax avoidance. The principal stockholder there had used the corporation to reduce taxes, and later, when it was to his advantage in order to avoid subjection of the corporation to a tax on a sale of corporate stock by the corporation to the stockholder, the claim was made that the corporation and stockholder were one. This Court in that case required observance of the corporate entity created originally to reduce taxes, but expressly recognized that the entity might be disregarded in a taxpayer's favor under "peculiar circumstances." That case did not present any question of agency, and the interested parties had in the past obtained substantial tax benefits from the corporation's existence.

It was in the course of commenting on the *Commonwealth Improvement Co.* case, and with direct reference to that case, and by way of distinguishing that case, that this Court then gave utterance to the dicta now relied on in order to base taxes on what are in fact unrealities. When the dicta are quoted for this purpose certain phrases are usually taken apart from their context, and given improper emphasis that disappear when the entire text is read. The full quotation is:

> "In the *Commonwealth Improvement Co.*, case, the tax payer, for reasons satisfactory to itself, *voluntarily* had chosen to employ the corporation in its operation. A taxpayer is free to

> adopt such organization for his affairs as he may choose and having elected to do so some business as a corporation, he must accept the tax disadvantages. (Italics ours.)
>
> "On the other hand, the government may not be required to acquiesce in the taxpayer's election of that form for doing business which is most advantageous to him. The government may look at actualities and upon determination that the form employed for doing business or carrying out the challenged tax event is unreal or a sham may sustain or disregard the effect of the fiction as best serves the purpose of the tax statute. To hold otherwise would permit the schemes of taxpeyers to supercede legislation in the determination of the time and manner of taxation. It is command of the income and its benefits which marks the real owner of the property."

It is, therefore, seen that this language, viewed in the setting which was the occasion of it, is directed against "schemes" of tax avoidance of which the *Commonwealth Improvement Co.* case was an example, *and with direct reference to that very case,* and is not a sweeping generalization for application in all cases, including those of agency. No mention is made of agency situations. The quoted language is used to support the conclusion, in a case in which there had been a determination by the triers of fact that a transaction was a sham, that the government is not bound by that sham. In other words the taxpayer went through certain motions, but, as in *Gregory v. Helvering,* 293 U. S., 465, 55 S. Ct. 266; 79, L. Ed. 596, 97 A. L. R. 1355, which is also cited, he did not actually do what he attempted to do.* On the other hand, where, as in the *Commonwealth Improvement Co.* case, the taxpayer employs the coroprate device and there is no agency situation, and especially where he thereby reduces taxes, he may not be heard later to disavow his own creature, voluntarily

created. (Moline was forced upon Thompson) when it is to his advantage so to do.

To give the quoted language in *Higgins v. Smith* the effect claimed for it would nuuify the preceding language in the same opinion, which recognizes that "unreality" (as distinguished from sham) may work either way. The case of *Higgins v. Smith* not only does not support the opinion of the court below; it lends strong support to the petitioner, and to the Board's decision.

The Fourth Circuit Court of Appeals in *U. S. v. Brager Building and Land Corporation*, 124 Fed. (2d) 349, quotes in full the above language from *Higgins v. Smith*, and then points out, in response to the Commissioner's argument, that "the diversity of business transactions in corporate form does not permit of so easy a generality" as that asserted by the Commissioner. The language in the Brager opinion, criticizing the "easy generality" of government's contention is equally applicable to the oversimplification indulged in by the Court below.

The Brager opinion recognizes that "schemes" to escape taxation will not be tolerated; but continues by saying that "it is going too far to say that if a taxpayer forms a corporation for his convenience, he is thereafter estopped from disclosing the true nature of the arrangement, whenever it is of advantage to the government to recognize only the corporate form." Reference in succeeding sentences to cases dealing with the situation "when a corporation has been formed merely as an agency to hold title to real estate for the convenience of the owner" makes it clear that what is meant is that if "the true nature of the arrangement" is an agency, the usual result must follow. It is submitted that the Brager opinion correctly construed the language and holding in *Higgins v. Smith* and that to quote again from the Brager opinion, the "body of the

law" relating to agency situations of the present sort cannot be regarded as having "now for practical purposes ceased to exist."

As the Brager opinion points out, the opinion in *Higgins v. Smith* does not preclude assertion, in such cases, of the fact of the agency relationship. The latter opinion is a warning against "schemes" of taxpayers to avoid, through corporate devices, taxes they really owe if economic realities are given effect. While it is true that a taxpayer's intent lawfully to minimize his taxes does not render unlawful what is otherwise lawful, yet a taxpayer who attempts a transparent "scheme" or device of the kind under scrutiny in *Higgins v. Smith* risks one of two consequences: if, as was the case in *Higgins v. Smith*, the device is a sham, the Government may, notwithstanding the sham, apply the philosophy of *Gregory v. Helvering, supra*, p. 25, and disregard it altogether. If, however, as in the *Commonwealth Improvement Co.* case, the taxpayer's "scheme" to reduce taxes produces, if given effect, a tax disadvantage, the Government may compel him to accept these consequences of his "scheme."

No such situation of attempted tax reduction is present here. The opinion in *Higgins v. Smith* does much more than condemn attempts of taxpayers to retain the fruits of income but escape the tax on such income. It also condemns determination of tax liability on the basis of "unrealities." This portion of the opinion the court below appears to have overlooked. When *Higgins v. Smith* is cited in support of the one-sided rule contended for by respondent and apparently announced by the court below, and by the Eight Circuit in the *Interstate Transit Lines* case, no mention is made of this condemnation of the use of an "unreal" factor in calculating taxes. In the present case, Moline's record ownership of the land is a necessary "factor" in the "calculation" of the deficiencies here under review. Such ownership is "unreal"; it is just as "unreal" as

the legal title held in trust for another, so far as the question of beneficial interest is concerned; such record ownership was merely as another's, Thompson's agent, or, if one prefers the term, trustee; and the Board so found. The court, however, reversing the Board, has exalted the "unreal" thing, the formal title in Moline, to become a "factor" in the "calculation" of a ruinous tax, which, because he is obviously a "transferee," Thompson, in spite of his financial troubles which the record so clearly portrays, will be forced to meet somehow. This, if the court below is upheld, is the only "reality" about the result, a harsh reality which, if allowed to stand, will represent a miscarriage of justice, and a discrimination against Thompson. The obvious effect would in such case be that Thompson pays more than the tax on his gain, for he would pay at the corporate instead of the individual tax rate, and in addition be mulcted in interest and penalties. Such an unfair discrimination is not warranted by anything in this record. It is condemned by the language and reasoning of *Higgins v. Smith*. It is contrary both to common sense and to the clearest dictates of justice. The gain on the sale of these lots should, petitioner submits, be taxed to Thompson, the real owner, not to Moline, the mere title holder, or "agent."

CONCLUSION

For the foregoing reasons it is earnestly submitted that the Court below has erred in holding that this Court's decision in *Higgins v. Smith* required as a matter of law the taxation to Moline of the gains from the sale of the lots here involved, and in reversing the Board of Tax Appeals, and accordingly it is urged that the decision of the Circuit Court of Appeals of the Fifth Circuit be reversed and that of the Board of Tax Appeals affirmed.

Respectfully submitted.

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APPENDIX

Revenue Act of 1934, ch. 277, 48 Stat. 680:

SEC. 13. TAX ON CORPORATIONS.

(a) Rate of Tax. There shall be levied, collected, and paid for each taxable year upon the net income of every corporation, * * *

SEC. 22. GROSS INCOME.

(a) General Definition. "Gross income" includes gains, profits and income derived from * * * sales, * * *

SECTION 52. CORPORATION RETURNS.

Every corporation subject to taxation under this title shall make a return, * * *

Revenue Act of 1936, ch. 690, 49 Stat. 1648:

SEC. 13. NORMAL TAX ON CORPORATIONS.

* * *

(b) Imposition of Tax. Tsere shall be levied, collected, and paid for each taxable year upon the normal-tax net income of every corporation, a normal tax as follows:

* * *

The provisions of Sections 22 (a) and 52 of the Revenue Act of 1936, supra, are identical with those set forth above.

IN THE

Supreme Court of the United States

No. 660

MOLINE PROPERTIES, INC.,

Petitioner,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

The statement of the "question presented" appearing in respondent's brief makes an assumption that is misleading. The question is not "whether the profits realized by the taxpayer corporation" should be included in the corporation's or the stockholder's gross income; the question is whether the profits were those of the taxpayer or of the stockholder. The concept embodied in respondent's statement of the "question presented" pervades a large

part of respondent's argument. Thus respondent at the outset of his argument treats the real estate as "owned by the corporation," and discusses the case as if the issue were whether the corporation, the petitioner herein, is "exempt" from the corporation income tax levied by Section 13 of the two revenue acts here involved. (Brief, p. 9.) It is said (*ibid*) that the issue "is whether the taxpayer may be subject to any tax under this section." If by this statement it is intended that the issue is whether on the facts any tax is due and owing by the petitioner corporation, the statement is correct; but if, as much of the succeeding argument suggests, it is intended to imply that the issue is whether the petitioner is in any event subject to the tax imposed by Section 13 or is exempt from that tax, then the manner of statement is incorrect and does not properly set out the substance of what constitutes the issue.

It is not contended, as suggested (Brief, p. 10), that Congress intended to exempt corporations "where their activity is limited and they have but one stockholder." The suggested distinction, under the capital stock tax provisions, between corporations engaged in business and those not in business is beside the point. A corporation, though but an agent, may still be "doing business" within the meaning of the capital stock tax laws. For example, a corporation engaged in the business of acting as trustee for others is "doing business" by the mere act of the performance of the trust function. It is of course taxable on income which it beneficially receives, as, for example, from fees for its services. But no one would contend that a corporate trustee, or agent, was, by virtue of the circumstance of its being a corporation and therefore subject to Section 13, also required to pay an income tax on gains in respect of property held by it in trust. This is true even if legal title is held by the trustee corporation and there is nothing in the record to indicate that its legal

title does not also include the beneficial ownership. It would not be contended in such a situation that because treatment of the trustee holder of the record title "eases the task of administration" the realities should be ignored and the trustee subjected to a tax upon gain which beneficially belonged to the *cestui que trust*.

It may be conceded that "one of the prices of a corporation is payment of the federal tax on the corporate income." (Brief, p. 14) This does not reach the question as to what constitutes the "corporate income." The suggestion (*ibid*, footnote) that Congress has made provision for certain situations in which it "has dictated that the corporate veil be pierced" is also irrelevant to a determination of the actual relationship between two legal entities. Although the problem in this type of case is sometimes characterized as one of determining whether or not there should be a "piercing of the corporate veil" or "disregard of the corporate entity," what is really involved is a determination whether some circumstance, such as fraud, estoppel, the rights and liabilities of the parties as between themselves, the relation of agency, or some other circumstance, precludes a result which might otherwise follow. Thus in the present case the question is whether or not the land was beneficially owned by Thompson. If it was, then the gains from its sale were Thompson's. The answer of the Board of Tax Appeals to this question is that Thompson was the beneficial owner.

Respondent refers (Brief, p. 15) to *Southern Pacific Company* v. *Lowe*, 247 U. S. 330, 38 S. Ct. 540, 62 L. Ed. 1142, and *Gulf Oil Corporation* v. *Lewellyn*, 248 U. S. 71, 39 S. Ct. 35, 63 L. Ed. 133, and then urges the distinction that these cases had to do with the question whether post-1913 dividends of the taxpayer which arose from the pre-1913 income of subsidiaries were to be regarded as income

accruing to the taxpayer after 1913. Respondent correctly says that the decision was that the taxpayers' relation with the subsidiaries was such that the income accrued to the former before the 1913 tax date. Just why this distinction affects the validity of these precedents is not apparent. The pre 1913 income of the Central Pacific was none the less income because when earned it was not subject to tax. The assimilation of the income to the Southern Pacific had no income tax consequence because there was no income tax law at the time; but the decision in the *Southern Pacific* case was that what was in form (prior to 1913) Central Pacific's income was in fact Southern Pacific's. Anyone familiar with the history of the Southern Pacific and the Central Pacific knows that the activities of the Central Pacific (even though it had no bank account and was completely dominated by the Southern Pacific) were far more substantial in character than those of the present petitioner. For example, it is a matter of history that the Central Pacific Railroad Company, the western end of the first trans-continental railroad, received a heavy loan of United States bonds, which constituted a second mortgage on most of the line between Ogden and San Francisco.[1] These bonds matured, together with very heavy accumulated back interest, during the financial storm of the 90's. A refinancing arrangement was made under which the Central Pacific's debt to the Government was extended over a period of ten years.[2] In addition, the Central Pacific had outstanding other corporate obligations in the form of various bond issues. Further, respondent's argument ignores the fact that post-1913 dividends from pre-1913 earnings were held taxable at the same time that the *Southern Pacific Company* decision was announced. *Lynch* v. *Hornby*, 247 U. S. 339, 38 S. Ct. 543, 62 L. Ed. 1149. There is no substantial

1. Daggett, History of the Southern Pacific, Ronald Press, New York, 1922, pp. 51-54.

2. *Ibid*, pp. 417, 423.

distinction, so far as the point here involved is concerned, between the *Southern Pacific Company* case and the present one.

Respondent says (Brief, p. 19) that a literal construction of Section 13 is not "productive of injustice or oppression," and that the provision for taxation "is there for all to heed as an incident to incorporation for business ventures." However pertinent such an argument may be in some situations, it is clearly inapplicable to the circumstances under which the present petitioner came into existence. Thompson had nothing to say about it except to determine whether he would accede to the arrangement demanded by an insistent creditor or accept the loss of his property. Respondent's statement of facts treats the demand for the organization of the corporation as something that was "proposed and agreed" (Brief, p. 3); whereas the fact is that it was a result of the creditor's demand and Thompson's enforced acquiescence. There was no "elaborate precaution" taken by Thompson "to relegate his interest in the property sold to that of stockholder rather than principal" (Brief, p. 24). The facts repel the inference that Thompson was interested in forming the corporation for the conduct of business as principal.

The relationship which came into being when Moline was organized was obviously a fiduciary relationship so far as was concerned any equity after the indebtedness. The rule is familiar that a conveyance which is absolute in form may be shown by extrinsic testimony to constitute a mortgage, so that the grantor may assert an equity of redemption. If Thompson had conveyed the land to the corporation by deed absolute in form (as was done in this case) but the stock, instead of being issued to him and transferred to the bank under a voting trust, had been issued directly to the bank, and the bank had later

asserted or caused Moline to assert that the conveyance included Thompson's entire interest, legal and equitable, in the land, it would have been open to Thompson to assert his beneficial interest in the equity and on paying the debt to have compelled a reconveyance to him.[1]

The formal issuance of the stock to Thompson and its conveyance by him to the bank under the voting trust arrangement cannot change the fact that Moline took nothing more than the naked legal title by the arrangement. The conveyance having run to Moline, no doubt a bona fide purchaser could rely upon the record; but no question is involved here of any estoppel in favor of a bona fide purchaser. The reason for the creation of the corporation was because the bank, for the ostensible purpose of strengthening its security, and doubtless because enforcement of its creditor rights seemed to it easier against a corporate holder of the title, demanded its creation. As respondent says (Brief, p. 22), when the corporation was first organized Thompson had no control over it, a fact which of itself demonstrates the unfairness, at least in the present case, of the argument (Brief, p. 19) that the corporate tax provision "is there for all to heed;" but he did have a very clear right in equity to enforce, upon payment of his debt, a return of his property. He was not in 1933 at the termination of the voting trust "simply in the position of a person taking over the stock of a corporation already organized and functioning." (Brief, p. 22) He was a person who had a right in equity to compel the bank to return him his collateral. If the bank had exercised its voting trust control in fraud of Thompson's rights to obtain for Moline, and through Moline for itself, the beneficial interest in this land, a

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1. Authorities are numerous which sustain the proposition stated in the text. Florida has the same rule. *De Bartlett* v. *De Wilson*, 52 Fla. 497, 42 Sou. 189, 11 Ann. Cas. 311.

court of equity would upon application by Thompson have made it clear that Moline's naked legal title did not include the beneficial interest, and that, as the Board of Tax Appeals held, the beneficial interest was in Thompson. This being the situation during the time of the bank's voting trust control, the relationship between the corporation and Thompson did not suddenly undergo a change when Thompson regained the stock control. The agency-fiduciary relationship existing at the conclusion of the voting trust was not altered. The return of the stock did not rise to the dignity of a conveyance to Moline of the beneficial interest. The corporation remained absolutely inactive. It performed no function other than that of a naked legal title holder after 1933 as well as before.

Whatever advantage there may have been to Thompson in the forming of the corporation as a means of salvaging something from his losses and protecting his equity, that purpose had been accomplished after 1933. There was absolutely no business reason for the continued existence of the corporation. Thompson could derive no advantage from it. His conduct in reference to his other holdings indicates that no purpose would be served by the corporate form. The most reasonable explanation for Thompson's omission to take steps to reacquire the formal legal title is inertia. His and his auditor's unfamiliarity with the tax laws led to reporting the gain, in 1934 and 1935, as the taxpayer's gain.

While everyone is presumed to know the law and no one can plead ignorance of the law to avoid the legal consequences of any particular situation, yet actual ignorance of the law applicable to a particular situation is relevant upon the question of intent. In the present case the record discloses that both the auditor and Thompson were ignorant of the *Forshay* decision, 20 B. T. A. 537, and the rule so often followed by the Board of Tax Appeals and other

tribunals with respect to dummy corporations holding title to property in which the beneficial interest is in another. The Federal Revenue Laws themselves do not hold any taxpayer irrevocably to a position once taken by him in his income tax returns, but, on the contrary, provide for liberal readjustments of income tax returns, both in favor of as well as against the taxpayer. The 1934 and 1935 returns made in ignorance of the taxpayer's and Thompson's rights raised no estoppel against showing the true facts. Whatever force the making of these returns may have had as evidence tending to show beneficial interest in the corporation is completely negatived by the circumstances surrounding the making of these reports and Thompson's and the auditor's ignorance of the doctrine applicable to dummy corporations. At the very most, this circumstance only raises a conflicting inference which the decision of the Board of Tax Appeals has resolved in the taxpayer's favor.

Respondent makes some reference to activities of the corporation, both before and after 1933. In the statement of facts respondent recites (Brief, p. 5), very briefly, that on October 1, 1929 the taxpayer purchased from Biscayne a note of Thompson's with a mortgage securing it in the amount of $43,000, on which interest of $9,703.14 was due, at par plus interest, giving its note for the purchase price and securing it with Thompson's mortgage. Just what is the purpose of this recital is not apparent; for it refers to the fraudulent transaction explained on page 5 of the original brief herein. The statement of facts also refers (Brief, p. 6) to the 1934 lease for parking lot purposes, in which connection respondent says that "it (the petitioner) received rental of $1,000." Reference is again made in the argument to this matter, in which connection respondent says (Brief, p. 22) that "in 1934 it (the petitioner) received income from renting a portion of its property." In thus assuming the very question here in issue, respondent also ignores the fact that the testimony permits of no

inference other than it was Thompson, not the taxpayer petitioner, that actually received this income. Any doubt on this subject is resolved by the Board's factual determination in favor of the taxpayer.

Respondent's argument in effect is that the fact of an agency or fiduciary relationship, although given effect in any other situation, may not as a matter of law ever be shown where the principal or party beneficially interested is also the sole stockholder of the agent or fiduciary. Although no attack is made on the *Southern Pacific* and *Gulf Oil Corporation* cases (which respondent himself at times cites[1] in converse situations), it is frankly contended that the "body of law" referred to in the *Brager* case, 124 Fed. (2d) 349, is wrong. Such decisions respondent says (Brief, p. 29) are based upon a "misconstruction of *Southern Pacific Company* v. *Lowe.*" The fact is, however, that respondent's position cannot be reconciled with the *Southern Pacific Company* case. While that case does not lay down any general rule favoring disregard of corporate entity, it did decide that in determining whether income is that of one entity or the other the decision is not to rest upon a mere rule of thumb, in accordance with whatever may appear to be the formal situation. Two things stand out prominently in the *Southern Pacific Company* decision, namely, that actualities are to govern, and that this rule works both ways.

In the present case if it had been to the advantage of the Commissioner that the gain from the sale of these lots be taxed to Thomposn, it is not unlikely that the converse argument would be made upon the same record as that here presented. In the absence of some element of tax avoidance, common fairness demands that substance

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1. For example, in his brief in this Court in *Higgins* v. *Smith*. The petitioner's reply brief in the *Interstate Transit Line* case, docket No. 552, sets out in the appendix some excerpts from that brief.

and not form, reality and not unreality, be the governing principle in determining which of two entities, corporation or the stockholder, is beneficially entitled to the income to be taxed. A recognition of actualities involves no difficulty of administration. In the routine handling of the examination of income tax returns the inquiry is normally directed to the ascertainment of the facts of any particular transaction. Respondent himself insists upon a full inquiry into the facts where it is the taxpayer that relies upon the form. The burden of an examination of the facts and reaching a decision based upon actualities is no greater when this assists the taxpayer than in the converse situation.

The record makes it plain that the present case is one of great hardship, if the decision of the court below is upheld. While this circumstance alone is not controlling, yet it does suggest that the harsh result of enforcement against petitioner (which as a practical matter means against Thompson, as transferee) of the tax asserted by respondent should not be tolerated unless absolutely compelled by law. Lower tribunals have in a considerable number of cases rejected the harsh and one-sided argument advanced by the respondent. Until very recently the Board of Tax Appeals, as its own opinion in the present case says, consistently followed the view urged by the present petitioner. This rule is consonant with justice and fairness. Respondent's argument rests upon a narrow and technical interpretation of the law, and upon exalting form above substance. It is earnestly submitted that this argument runs counter to the spirit of modern decisions, and that the contrary view expressed

in authorities giving the taxpayer relief under such situations should be adopted, and the decision below reversed and that of the Board of Tax Appeals reinstated.

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CITATIONS

511411—43

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 660

MOLINE PROPERTIES, INC., PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 16–22) is reported in 45 B. T. A. 647. The opinion of the Circuit Court of Appeals (R. 89–91) is unreported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 7, 1942 (R. 91). Petition for rehearing was denied December 11, 1942 (R. 98). The petition for a writ of certiorari was filed on January 18, 1943. Jurisdiction is conferred on

this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the profits realized by petitioner corporation should be included in its taxable gross income or whether, as petitioner contends, the corporate entity should be disregarded and its income attributed to its sole stockholder.

STATUTES INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 13. TAX ON CORPORATIONS.
>
> (a) *Rate of tax.*—There shall be levied, collected, and paid for each taxable year upon the net income of every corporation, * * *
>
> SEC. 22. GROSS INCOME.
>
> (a) *General definition.*—"Gross income" includes gains, profits, and income derived from * * * sales, * * *
>
> SEC. 52. CORPORATION RETURNS.
>
> Every corporation subject to taxation under this title shall make a return, * * *

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 13. NORMAL TAX ON CORPORATIONS.
>
> * * * * *
>
> (b) *Imposition of tax.*—There shall be levied, collected, and paid for each taxable year upon the normal-tax net income of every corporation, a normal tax as follows:
>
> * * * * *

The provisions of Sections 22 (a) and 52 of the Revenue Act of 1936, *supra*, are identical with those set forth above.

STATEMENT

This case involves petitioner's income tax liability for the years 1935 and 1936. The facts as found by the Board of Tax Appeals (R. 17–19) may be summarized as follows:

The petitioner is a corporation, organized under the laws of Florida in 1928. Its president and sole stockholder, with the exception of holders of qualifying shares, has at all times been Uly O. Thompson. (R. 17.)

On August 17, 1920, Thompson acquired certain real estate in Florida, which he mortgaged in 1923 for $20,000. On March 18, 1926, he gave a second mortgage on this property to Miami Beach Bank and Trust Company, hereinafter referred to as Miami, to secure an additional loan of $20,000. (R. 17.)

Subsequently, Thompson failed to pay the taxes on the property and was told by the second mortgagee that the taxes would have to be paid to prevent the loss of the property. The proposal was made that the Bank of Bay Biscayne, hereinafter referred to as Biscayne, with which Miami was affiliated, would lend $6,750 to pay the accumulated taxes if Thompson would authorize Biscayne to organize a corporation to hold title to the property which was identified as "Block 77." (R. 17,

36.) The stock of the corporation would be issued to Thompson. It would then be pledged as collateral for the loan and placed by Thompson in a voting trust to be controlled by the bank. The trust would cease either on payment of the loan or sale of the pledged stock. (R. 17.) Pursuant to this agreement the petitioner was organized and its stock, with the exception of qualifying shares, issued to Thompson. On June 5, 1928, Thompson conveyed Block 77 to the petitioner and executed the voting trust agreement. The petitioner assumed and agreed to pay the two mortgages as a part of the purchase price. (R. 17–18.)

Biscayne closed in 1930 and its powers under the voting trust were thereafter exercised by the bank liquidator (R. 18). The debt of $6,750 owed to Biscayne was settled by the petitioner during 1933 (R. 18). In that year the stock of the petitioner which had been pledged and held under the voting trust was returned to Thompson (R. 18). On July 29, 1933, the petitioner discharged and satisfied the two mortgages which were outstanding on the property owned by it, each in the amount of $20,000. Funds for these discharges were obtained by Thompson through a loan which he negotiated with the National Investment Holdings, Inc. This loan was secured by a mortgage on a portion of the property in question. (R. 18.)

Sometime during the period that the voting trust was in effect a suit was instituted to remove cer-

tain restrictions imposed on Block 77 by a prior deed. Of the expenses connected with this suit, $4,005.39 was paid by Thompson in 1933 and subsequent years. The petitioner was also required to defend a certain condemnation proceeding during this period. (R. 18.)

The petitioner on October 1, 1929, purchased from Biscayne a note of Thompson's, together with a real-estate mortgage securing it, in the amount of $43,000, on which interest of $9,703.14 was due, at its par value plus accrued interest. The petitioner gave its note for the purchase price, securing it with Thompson's mortgage, which it received on the purchase of the note. (R. 18.)

The petitioner's property was sold in three separate parcels, one in each of the years 1934, 1935, and 1936 (R. 19). The debt owed to National was paid in 1936 from the proceeds of the sales (R. 18). The proceeds of the sales were received by Thompson, who deposited them in his bank account (R. 19).

The sales made in 1934 and 1935 were reported in the income tax returns of the petitioner. A loss was reported for 1934 and a gain for 1935. Subsequently Thompson was advised by his auditor that due to the circumstances of the petitioner's organization, these sales might be reported by Thompson and a claim for refund of tax accordingly filed on the petitioner's behalf for 1935. In a delinquent

return filed in 1938, Thompson reported the 1935 gain as his individual gain. Gain on the 1936 sale was reported by Thompson. (R. 19.)

The petitioner did not keep books of account or maintain a bank account. It owned no assets other than the real estate described above. It leased a portion of its properties in 1934 for parking lot purposes, from which it received rental of $1,000. Thompson owned other real property in Miami, title to which was in his name individually. (R. 19.)

During 1934 and a part of 1935 Thompson was a circuit judge of the State of Florida. His salary was his principal source of income. When his office was abolished in 1935 he returned to the practice of law. (R. 19.)

The petitioner has not been dissolved. However, it has transacted no business since the sale of its property in 1936. (R. 19.)

The Commissioner ruled that the profits realized by petitioner in 1935 and 1936 must be included in its taxable income, but the Board of Tax Appeals reversed, holding that the existence of the taxpayer must be disregarded for tax purposes (R. 19–22). The Circuit Court of Appeals in turn reversed the Board and held that Thompson having voluntarily chosen to organize petitioner to conduct certain business affairs, both he and petitioner could not disavow the corporate entity in order to obtain a tax advantage thereby (R. 91).

ARGUMENT

The court below held that petitioner could not disavow its own existence in order to avoid a tax disadvantage resulting from its creation. The decision is correct; it presents no conflict.

The rule is well established that a corporation and its stockholders are ordinarily separate entities for tax as well as other purposes. *Klein* v. *Board of Supervisors*, 282 U. S. 19; *Dalton* v. *Bowers*, 287 U. S. 404; *Burnet* v. *Clark*, 287 U. S. 410; *Burnet* v. *Commonwealth Imp. Co.*, 287 U. S. 415; *New Colonial Co.* v. *Helvering*, 292 U. S. 435. In *Higgins* v. *Smith*, 308 U. S. 473, this Court, in the course of holding that a taxpayer who had organized a corporation wholly owned by him was entitled to no loss deduction upon the sale of securities to such corporation, nevertheless declared (p. 477):

> A taxpayer is free to adopt such organization for his affairs as he may choose and having elected to do some business as a corporation, he must accept the tax disadvantages.

This principle has been widely applied. See, *e. g.*, *Esmond Mills* v. *Commissioner* (C. C. A. 1st), decided January 7, 1943 (1943 C. C. H., par. 9237); *Palcar Real Estate Co.* v. *Commissioner*, 131 F. 2d 210 (C. C. A. 8th); *Interstate Transit Lines* v. *Commissioner*, 130 F. 2d 136 (C. C. A. 8th), pending on petition for certiorari, No. 552, present Term; *Vim Securities Corp.* v. *Commissioner*, 130 F. 2d 106

(C. C. A. 2d), certiorari denied December 7, 1942, No. 508, present Term; *Texas-Empire Pipe Line Co.* v. *Commissioner*, 127 F. 2d 220 (C. C. A. 10th); *Salmon* v. *Commissioner*, 126 F. 2d 203 (C. C. A. 2d); *Watson* v. *Commissioner*, 124 F. 2d 437 (C. C. A. 2d).

The court below decided that this principle was properly applicable to the instant case. If, as the Board of Tax Appeals said, petitioner was created (R. 20)—

> as a means of protecting their [the creditors'] investments and of saving his [Thompson's] equity in certain Florida real estate,

it is clear that it was created to carry out a business purpose.[1] To say that petitioner may disavow its corporate existence on the ground that it was merely a "dummy" corporation serving no business purpose would be to negate the very reason for which it was brought into being.

When petitioner was first organized, Thompson had no control over it (cf. *New Colonial Co.* v. *Helvering*, *supra*, p. 441), and even after the voting trust agreement was terminated in 1933 he was simply in the position of a person taking over the stock of a corporation already organized and functioning. After the settlement of the $6,750 loan from Biscayne and the payment of the two mort-

[1] The petitioner's charter authorized it to carry on broad and varied activities (R. 61–70).

gages, petitioner continued its corporate existence. In 1934 it received income from renting a portion of its property and it was engaged in litigation with respect to a deed restriction and in selling its property at least through part of 1936. Some of the proceeds from the sale of property in 1936 were used to pay the loan authorized by petitioner and secured by a mortgage on its property, as well as accumulated taxes against the property.

The court below did not hold, as petitioner assumes, that in every instance a taxpayer who forms a corporation is precluded from showing the true nature of the arrangement so as to escape a tax disadvantage. Rather, it held that in the circumstances here involved, where petitioner was organized to conduct certain business affairs, and did conduct them, the corporate existence could not be ignored in an effort to secure thereby a tax advantage.

The present case is not, as petitioner asserts, in conflict with either *United States* v. *Brager Building & Land Corp.*, 124 F. 2d 349 (C. C. A. 4th), or *Inland Development Co.* v. *Commissioner*, 120 F. 2d 986 (C. C. A. 10th).[2] It is true that in each of these cases the taxpayer prevailed in his contention that the separate identity of the cor-

[2] *North Jersey Title Ins. Co.* v. *Commissioner*, 84 F. 2d 898 (C. C. A. 3d), which petitioner also contends is in conflict with the court's decision in the present case, was decided prior to *Higgins* v. *Smith*. It involved a situation similar to that presented in the *Brager* case.

porations involved should be disregarded. But obviously it cannot be said that a conflict exists simply because in some cases the corporate entity is disregarded, while in others it is not. The *Brager* case (pp. 350, 352) turned on the circumstance that the corporation was of a "purely nominal character," which "had no business activities and served no purpose other than the passive holding of the legal title" to property. The Circuit Court of Appeals for the Fourth Circuit itself has subsequently distinguished the *Brager* case on this ground. See *American Package Corp.* v. *Commissioner*, 125 F. 2d 413, 415 (C. C. A. 4th).[1]

In *Inland Development Co.* v. *Commissioner*, which involved the application of the personal holding company statute, the Circuit Court of Appeals for the Tenth Circuit disregarded the corporate identity of the several subsidiary companies on the ground (p. 989) that such subsidiaries were nothing more than "voiceless departments" or mere agents of the parent taxpayer. The situation

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[1] It is questionable whether the same result would have been reached by the Fourth Circuit in the *Brager* case if that case had been decided after the reversal of its decision in *Powell* v. *Gray*, 114 F. 2d 752 (C. C. A. 4th), in which this Court, citing *Higgins* v. *Smith*, *supra*, stated (314 U. S. 402, 414): "The choice of disregarding a deliberately chosen arrangement for conducting business affairs does not lie with the creator of the plan."

It is also not without significance that unlike the petitioner here, the corporation in the *Brager* case did not assume the mortgage debt against the property transferred to it.

in that case was deemed distinguishable by the same court in the later case of *Texas-Empire Pipe Line Co.* v. *Commissioner, supra*, p. 224, where the Tenth Circuit found that the subsidiaries there involved were created to serve a "legitimate business purpose." Both the *Brager* and *Inland Development Company* cases presented "peculiar situations and were determined upon consideration of them."[4] *Interstate Transit Lines* v. *Commissioner, supra*, p. 140. See also *Palcar Real Estate Co.* v. *Commissioner, supra.*

Irrespective of whether the facts of those cases might have justified the conclusion that the corporations in question were "substantial" enough so as not to be disregarded, the instant case presents a situation where petitioner clearly was created a business purpose and was employed to carry out that objective. As such it cannot contend that its existence was "illusory." Cf. *Vim Securities Corp.* v. *Commissioner, supra*, p. 109.

The present case does not raise the question, and this Court should not, as petitioner insists, be called upon to decide "whether *under any circumstances* a taxpayer may invoke the 'agency' doc-

[4] Even before *Higgins* v. *Smith*, the anomalous cases in which corporate entities were disregarded at the insistence of the taxpayer were carefully limited to the exceptional situations and peculiar facts which they presented. See *Southern Pacific Co.* v. *Lowe*, 247 U. S. 330, 338. Cf. *Burnet* v. *Commonwealth Imp. Co., supra*, pp. 419–420; *New Colonial Co.* v. *Helvering, supra*, p. 442.

trine, or is wholly estopped from doing so *by the mere circumstance, without more,* that he has brought the entity into its fictional being" (Pet. 10). [Italics supplied.]

CONCLUSION

The decision below is correct. There is no conflict of decisions. The petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, Jr.,
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Special Assistants to the Attorney General.

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CITATIONS

Cases—Continued.

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 660

MOLINE PROPERTIES, INC., PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 16–22) is reported in 45 B. T. A. 647. The opinion of the Circuit Court of Appeals (R. 89–91) is reported in 131 F. 2d 388.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 7, 1942 (R. 91). Petition for rehearing was denied December 11, 1942 (R. 98). The petition for a writ of certiorari was filed on January 18, 1943, and was granted on March 8, 1943. The jurisdiction of this Court

rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the profits realized by the taxpayer corporation should be included in its taxable gross income or whether, as the taxpayer contends, the corporate entity should be disregarded and its income attributed to its sole stockholder.

STATUTES INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 13. TAX ON CORPORATIONS.
>
> (a) *Rate of Tax.*—There shall be levied, collected, and paid for each taxable year upon the net income of every corporation, * * *.
>
> * * * * *
>
> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from * * * sales, * * *.
>
> * * * * *
>
> SEC. 52. CORPORATION RETURNS.
>
> Every corporation subject to taxation under this title shall make a return, * * *.

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 13. NORMAL TAX ON CORPORATIONS.
>
> * * * * *
>
> (b) *Imposition of Tax.*—There shall be levied, collected, and paid for each taxable year upon the normal-tax net income

of every corporation, a normal tax as follows:

* * * * *

The provisions of Sections 22 (a) and 52 of the Revenue Act of 1936, *supra,* are identical with those set forth above.

STATEMENT

This case involves the taxpayer's income tax liability for the years 1935 and 1936. The facts as found by the Board of Tax Appeals (R. 17–19) may be summarized as follows:

The taxpayer is a corporation, organized under the laws of Florida in 1928. Its president and sole stockholder, with the exception of holders of qualifying shares, has at all times been Uly O. Thompson. (R. 17.)

On August 17, 1920, Thompson acquired certain real estate in Florida, which he mortgaged in 1923 for $20,000. On March 18, 1926, he gave a second mortgage on this property to Miami Beach Bank and Trust Company, hereinafter referred to as Miami, to secure an additional loan of $20,000. (R. 17.)

Subsequently, Thompson failed to pay the taxes on the property and was told by the second mortgagee that the taxes would have to be paid to prevent the loss of the property. It was then proposed and agreed that the Bank of Bay Biscayne, hereinafter referred to as Biscayne, with which Miami was affiliated, would lend $6,750 to

pay the accumulated taxes and that Thompson in return would authorize Biscayne to organize a corporation to hold title to the property which was identified as "Block 77." (R. 17, 36.) The stock of the corporation was to be issued to Thompson. It would then be pledged as collateral for the loan and placed by Thompson in a voting trust to be controlled by the bank. The trust would cease either on payment of the loan or sale of the pledged stock. (R. 17.) Pursuant to this agreement the taxpayer was organized and its stock, with the exception of qualifying shares, issued to Thompson. On June 5, 1928, Thompson conveyed Block 77 to the taxpayer and executed the voting trust agreement. The taxpayer assumed and agreed to pay the two mortgages as a part of the purchase price. (R. 17–18.)

Biscayne closed in 1930 and its powers under the voting trust were thereafter exercised by the bank liquidator (R. 18). The debt of $6,750 owed to Biscayne was settled by the taxpayer during 1933 (R. 18). In that year the stock of the taxpayer which had been pledged and held under the voting trust was returned to Thompson (R. 18). On July 29, 1933, the taxpayer discharged and satisfied the two mortgages which were outstanding on the property owned by it, each in the amount of $20,000. Funds for these discharges were obtained by Thompson through a loan which he negotiated with the National Investment Hold-

ings, Inc. This loan was secured by a mortgage on a portion of the property in question. (R. 18.)

Sometime during the period that the voting trust was in effect a suit was instituted to remove certain restrictions imposed on Block 77 by a prior deed. Of the expenses connected with this suit, $4,005.39 was paid by Thompson in 1933 and subsequent years. The taxpayer was also required to defend a certain condemnation proceeding during this period. (R. 18.)

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The taxpayer's property was sold in three separate parcels, one in each of the years 1934, 1935, and 1936 (R. 19). The debt owed to National was paid in 1936 from the proceeds of the sales (R. 18). The proceeds of the sales were received by Thompson, who deposited them in his bank account (R. 19).

The sales made in 1934 and 1935 were reported in the income tax returns of the taxpayer. A loss was reported for 1934 and a gain for 1935. Subsequently Thompson was advised by his auditor that due to the circumstances of the tax-

payer's organization, these sales might be reported by Thompson and a claim for refund of tax accordingly filed on the taxpayer's behalf for 1935. In a delinquent return filed in 1938, Thompson reported the 1935 gain as his individual gain. Gain on the 1936 sale was reported by Thompson. (R. 19.)

The taxpayer did not keep books of account or maintain a bank account. It owned no assets other than the real estate described above. It leased a portion of its properties in 1934 for parking lot purposes, from which it received rental of $1,000. Thompson owned other real property in Miami, title to which was in his name individually. (R. 19.)

During 1934 and a part of 1935 Thompson was a circuit judge of the State of Florida. His salary was his principal source of income. When his office was abolished in 1935 he returned to the practice of law. (R. 19.)

The taxpayer has not been dissolved. However, it has transacted no business since the sale of its property in 1936. (R. 19.)

The Commissioner ruled that the profits realized by the taxpayer in 1935 and 1936 must be included in its taxable income, but the Board of Tax Appeals reversed, holding that the existence of the taxpayer must be disregarded for tax purposes. (R. 19–22.) The Circuit Court of Appeals in turn reversed the Board and held that Thompson having voluntarily chosen to organize

taxpayer to conduct certain business affairs, neither he nor the taxpayer could disavow the corporate entity in order to obtain a tax advantage thereby. (R. 91.)

SUMMARY OF ARGUMENT

Under Section 13 of the Revenue Acts of 1934 and 1936 a tax is levied on the income of every corporation. No exception is made with respect to wholly-owned realty corporations merely because they transact little business. For purposes of the capital stock tax Congress distinguishes between corporations engaged in business and those that are not so engaged. Failure to make such a distinction in the income tax provisions indicates that the tax is levied on the income of every corporation with the intent that all corporations should be subject thereto. Reinforcing this view is the fact that when Congress has wished to withdraw corporations from the operation of Section 13 special provision has been made. Thus it is clear that Congress intended a tax to be levied on the income of every corporation whatever the nature of its activity or the ownership of its stock. This broad construction of Section 13 is in harmony with this Court's decisions in *Burnet* v. *Commonwealth Imp. Co.*, 287 U. S. 415, and *Higgins* v. *Smith*, 308 U. S. 473.

The result is that one who chooses to do business as a corporation must pay the tax levied by Section 13. Nor is the case altered by conten-

tion that the corporation here involved is to be regarded as a mere agent. The decision to do business in corporate form with the corporation held out as the principal means that the burdens of doing business in that fashion must be borne by the corporation. Since the taxpayer was created for the purpose of receiving ownership of property, and that property was sold as its property, the Commissioner is authorized by Section 13 to assess a tax against it on gain from that sale. Any other result would require repudiation of the decision in *Burnet* v. *Commonwealth Imp. Co., supra,* and the statements in *Higgins* v. *Smith, supra.*

As a matter of fact, the taxpayer did not in fact occupy the role of an agent. It was rather organized for a recognized business purpose. It was intended to, and did in fact, function as an entity distinct from its stockholder. Even on the legal principl contended for by the taxpayer, therefore, the tax was properly imposed.

ARGUMENT

NEITHER THE INSUBSTANTIAL CHARACTER OF ITS FUNCTIONS NOR THE FACT IT HAS BUT ONE STOCKHOLDER WILL RELIEVE A CORPORATION FROM TAXATION ON ITS INCOME

The taxpayer was duly organized as a corporation under the laws of Florida in 1928 (R. 17). Subsequently it performed the business functions for which it was created and others as well. The

income in question resulted from the sale of realty owned by the corporation. Because the situation of its sole stockholder for the tax years in question, 1935 and 1936, was such that attributing this income to him rather than to the corporation would effect a tax saving,[1] this litigation developed. The taxpayer-corporation seeks a declaration that, by reason of the limited character of its activities and its relation with its sole stockholder, it is exempt from the tax levied by Section 13 of the Revenue Acts of 1934 and 1936, *supra*. The issue here, it must be noted, is whether the taxpayer may be subject to any tax under this section.

At the outset it may be observed that no question is here presented respecting general principles governing disregard of the corporate entity, if there be such.[2] Nor indeed does this case require decision as to when the corporate personality will be disregarded in tax cases generally. The taxpayer's contention raises first the issue

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[1] Corporations do not have the benefit of the statutory provisions taxing only a percentage of long-term gains. Section 117 (a) of the Revenue Acts of 1934 and 1936. Moreover, they do not have the individual credit given by Section 25 (b) of the Revenue Acts of 1934 and 1936. For the tax situation of the sole stockholder for 1936, see pages 82-84 of the Record.

[2] For analytical treatment of the general problem see Latty, *The Corporate Entity as a Solvent of Legal Problems* (1936), 34 Mich. L. Rev. 597; Radin, *The Endless Problem of Corporate Personality* (1932), 32 Col. L. Rev. 643; Machen, *Corporate Personality* (1911), 24 Harv. L. Rev. 253, 347.

whether Congress intended to exempt corporations from the tax levied by Section 13 where their activity is limited and they have but one stockholder.

By the terms of Section 13 a tax is levied on the net income "of every corporation". Corporations exempted from the tax are specifically enumerated in Section 101 of the Revenue Acts of 1934 and 1936 and none of the exceptions embraces the taxpayer. Indeed, specific exemption of "Corporations organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses * * *" (Section 101 (14) of the Revenue Acts of 1934 and 1936) *only* when performing that function for an exempt corporation is persuasive by itself that otherwise a realty corporation is subject to the tax imposed by Section 13.

The language of Section 13, it may again be noted, lays a tax on the income of "every" corporation. Nor can this all-inclusive language be charged to legislative oversight or accident. For capital stock tax purposes Congress has long and consistently distinguished between corporations engaged in business and those that are not, with the tax levied on the former only.[3]

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[3] Revenue Act of 1934:

SEC. 701. CAPITAL STOCK TAX.

(a) For each year ending June 30, beginning with the year ending June 30, 1934, there is hereby imposed

Indeed, the excise tax assessed against corporations prior to 1913, measured by their incomes, was levied only on corporations doing business and there had been considerable litigation on the question as to what corporate activity constitutes doing business. For representative decisions see *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503; *United States* v. *Emery*, 237 U. S. 28; and *McCoach* v. *Minehill Railway Co.*, 228 U. S. 295.

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upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock.

* * * * *

(c) The taxes imposed by this section shall not apply—

* * * * *

(3) to any domestic corporation in respect of the year ending June 30, 1934, if it did not carry on or do business during a part of the period from the date of the enactment of this Act to June 30, 1934, both dates inclusive; * * *

* * * * *

A similar provision appeared in Section 407 of the Revenue Act of 1916, c. 463, 39 Stat. 756; Section 1000 of the Revenue Act of 1918, c. 18, 40 Stat. 1057; Section 1000 of the Revenue Act of 1921, c. 136, 42 Stat. 227; Section 700 of the Revenue Act of 1924, c. 234, 43 Stat. 253; Section 105 of the Revenue Act of 1935, c. 829, 49 Stat. 1014; and Section 401 of the Revenue Act of 1936.

Representative of the Regulations defining the doing of business by corporations are Regulations 64, Articles 86 and 88, issued under the Revenue Act of 1934:

ART. 86. "*Not doing business*" *illustrated.*—Holding companies (as defined in article 88); * * * are not doing business.

* * * * *

Under these circumstances the Congressional decision in the Income Tax Act of 1913, c. 16, 38 Stat. 114, 166, and its successors, to levy a tax on the income of every corporation becomes doubly significant. Discarded for purposes of this tax was distinction between corporations on the basis of the nature of the corporate activity. Surely this is persuasive that Section 13 was designed by Congress to tax the income of every species of corporation. Significant in this connection as well are the requirements respecting the filing of returns. Under Section 52 of the Revenue Act of 1934, *supra*, a return is to be filed by *every* corporation subject to taxation under the act. Dovetailing with this section is the provision respecting returns by fiduciaries.[4] Such returns are required of fiduciaries for individuals, estates and trusts, but not

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ART. 88. *Holding company defined.*—A holding company is one whose corporate powers are limited to the mere owning and holding of property and distribution of its avails, or one which, although incorporated for the purpose of doing business, has retired from the business for which it was organized and has reduced its activities to the mere ownership and holding of property, distributing its avails, and doing only such acts as are necessary to the maintenance of its corporate existence and the private management of its purely internal affairs.

A recent decision of this Court respecting corporate liability for the capital stock tax and thus turning on the question whether the corporation was engaged in business is *Magruder* v. *Washington, B. & A. Realty Corp.*, 316 U. S. 69.

[4] Section 142 of the Revenue Acts of 1934 and 1936.

for corporate beneficiaries, the reason, of course, being that all corporations, even the most passive beneficiaries, must themselves report their income.

The obvious proposition that Section 13 should be applied in accordance with its terms is further confirmed by the fact that on occasion Congress has withdrawn from its operation certain types of corporations. Illustrative are the provisions that appeared in the Revenue Acts of 1918 and 1921, taxing the income of personal service corporations directly to the stockholders thereof.[5] Provision has been made in various Revenue Acts for the filing of consolidated returns of affiliated corporations,[6] thus withdrawing these corporations from the scope of Section 13. Unless subsidiary corporations would otherwise have been subject to separate taxation on their income there would have been no point in such provision, none in its restriction to railroad corporations in Section 141 of the Revenue Act of 1934, and none in its general restoration in Section 141 of the Revenue Act of 1942, Public

[5] Section 218 of the Revenue Acts of 1918 and 1921.

[6] Section 240 of the Revenue Acts of 1918, 1921, 1924, and 1926, c. 27, 44 Stat. 9; Section 141 of the Revenue Act of 1928, c. 852, 45 Stat. 791, and 1932, c. 209, 47 Stat. 169, provided for consolidated returns of affiliated corporations generally. Similar provision appears in Section 141 of the Internal Revenue Code, as amended by the Revenue Act of 1942, Public Law 753, 77th Cong., 2d Sess., Sec. 159.

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Law 753, 77th Cong., 2d Sess. Such measures, under elementary interpretive rules, reflect clear legislative recognition of the broad sweep of Section 13—that it means what it says, i.e., that one of the prices of incorporation is payment of a federal tax on the corporate income.

The clarity of the language imposing the tax was certainly not calculated to breed litigation. In fact, only on rare occasions in this Court has it been argued that notwithstanding the clear expression of Section 13 to the contrary, there is a species of corporation of little activity and intimate association with the business of its sole stockholder which is not subject to income taxation. The argument was made in *Burnet* v. *Commonwealth Imp. Co.*, 287 U. S. 415, where this Court, without denying that the corporation had little vitality held that it was taxable on its income notwithstanding. In making that same con-

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[7] Reference may be made as well to certain other instances where Congress has dictated that the corporate veil be pierced. In Section 337 of the Revenue Act of 1936 as amended, 50 Stat. 822, the "undistributed Supplement P net income of a foreign personal holding company shall be included in the gross income of citizens or residents of the United States." Similar provision appeared in Section 337 of the Revenue Act of 1938, c. 289, 52 Stat. 447, and in Section 337 of the Internal Revenue Code.

Provision was made in Section 128 of the Revenue Act of 1942 for allowing tenant-stockholders of cooperative apartment corporations to deduct from their gross income that portion of payments to the corporation representing its taxes and interest.

tention here the taxpayer relies in part on the same authority advanced by the taxpayer there—*Southern Pacific Co.* v. *Lowe*, 247 U. S. 330, and *Gulf Oil Corp.* v. *Lewellyn*, 248 U. S. 71.

Neither of these cases, it should be noted, held any corporation a nontaxable entity. The issue presented in both was whether post-1913 dividends to the taxpayer corporation from the pre-1913 earnings of wholly owned subsidiaries were to be regarded as income accruing to the taxpayer after 1913. The decision was that in view of the taxpayers' integration with their wholly owned subsidiaries, the income accrued to the former before the 1913 tax date. In the opinions in those cases and in *Burnet* v. *Commonwealth Imp. Co.*, *supra*, at pp. 419–420, this Court has made it abundantly clear that these cases rest on their peculiar facts and do not support the general proposition that a wholly owned corporation and its owner are identical for tax purposes.

The peculiar fact which was the basis for those decisions sharply limits their significance. This Court was of the view that Congress, in the Income Tax Act of 1913, had made clear its intention that no income earned and available to a taxpayer prior to 1913 should be taxed as income accruing thereafter. Cf. *Lynch* v. *Turrish*, 247 U. S. 221, with *Peabody* v. *Eisner*, 247 U. S. 347. It was this view of the expressed will of Congress that dictated assimilation of wholly owned subsidiaries to the parent corporation in determining

when income accrued. Thus these decisions, at most, only stand for the proposition that wholly owned corporations may be identified with their owners for tax purposes when required to effectuate an expressed Congressional policy. See *New Colonial Co. v. Helvering*, 292 U. S. 435, 442.

This Court's recent decision in *Higgins v. Smith*, 308 U. S. 473, is pertinent. The issue there was whether the taxpayer, an individual, had sustained a deductible loss on a sale of securities to his wholly owned corporation, formed in part to secure tax advantages and whose business was largely restricted to buying and selling securities to him. In the course of the opinion holding that the asserted loss was not deductible reference was made to the opinion in *Burnet v. Commonwealth Imp. Co., supra*, and the observation made that pp. 477–478)—

> In the *Commonwealth Improvement Company* case, the taxpayer, for reasons satisfactory to itself voluntarily had chosen to employ the corporation in its operations. A taxpayer is free to adopt such organization for his affairs as he may choose and having elected to do some business as a corporation, he must accept the tax disadvantages.
>
> On the other hand, the Government may not be required to acquiesce in the taxpayer's election of that form for doing business which is most advantageous to him. The Government may look at actualities and upon determination that the

> form employed for doing business or carrying out the challenged tax event is unreal or a sham may sustain or disregard the effect of the fiction as best serves the purposes of the tax statute. To hold otherwise would permit the schemes of taxpayers to supersede legislation in the determination of the time and manner of taxation. It is command of income and its benefits which marks the real owner of property.

In accordance with this pronouncement, and the decision of the case, if the corporate form employed for doing business is unreal or a sham the Commissioner may disregard it in fixing income tax liability "as best serves the purposes of the tax statute". If this should mean that in any case a corporation is relieved from liability for the tax levied by Section 13, it is only another instance where that happens as an incident to effectuating an overriding Congressional policy, i. e., that mere form of organization shall not be permitted to operate so as to promote tax avoidance.[8] Even though the corporation be inactive, however, there is no recognized or identifiable policy of Congress that requires its exemption from taxation under the broad language of Section 13 where its taxation has no adverse effect on the public revenue. Indeed, when the tax saving feature is absent

[8] See Section 45 of the Revenue Acts of 1934 and 1936.

the only applicable Congressional policies are: (1) That expressed in Section 13, i. e., that every corporation shall pay a tax on its income; (2) that expressed in Section 117 (a), i. e., that capital gains shall be fully taxable when realized by corporations, and (3) that expressed in Section 141 (d) (3), Revenue Acts of 1934 and 1936, strictly limiting consolidated returns to railroad carriers.[9]

There are no prior decisions of this Court that hold a corporation is exempt from income taxation because of the insubstantial character of its activities or the fact that it has but one stockholder.[10] As seen above, such an argument was made and rejected in *Burnet* v. *Commonwealth Imp. Co.*, 287 U. S. 415. To refuse, in construing Section 13, to assimilate a wholly-owned corporation to its owner is, moreover, in harmony with decisions recognizing the corporate entity

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[9] For discussion, at some length, of the legislative history underlying the consolidated return provision, see brief for the respondent in *Interstate Transit Lines* v. *Helvering*, No. 552, present Term, now pending before this Court.

[10] A number of Circuit Court of Appeals decisions disregarding the corporate entity for other tax purposes did so in order to effectuate an expressed Congressional policy that was regarded as requiring such veil piercing. Explainable on this basis are *Munson S. S. Line* v. *Commissioner*, 77 F. 2d 849 (C. C. A. 2d); *Continental Oil Co.* v. *Jones*, 113 F. 2d 557 (C. C. A. 10th), certiorari denied, 311 U. S. 687; and *Inland Development Co.* v. *Commissioner*, 120 F. 2d 986 (C. C. A. 10th). With this last case, cf. *Texas-Empire Pipe Line Co.* v. *Commissioner*, 127 F. 2d 220 (C. C. A. 10th).

in interpreting other provisions of the Revenue Acts. *Dalton* v. *Bowers*, 287 U. S. 404 (loss by a wholly-owned corporation cannot be deducted by the owner on his individual return); *Burnet* v. *Clark*, 287 U. S. 410 (similar); *New Colonial Co.* v. *Helvering*, 292 U. S. 435 (successor corporation cannot have the benefit of losses of its predecessor). Cf. *Groman* v. *Commissioner*, 302 U. S. 82, 89; *Helvering* v. *Bashford*, 302 U. S. 454, 458.

Nor is a literal construction of Section 13 productive of injustice or oppression. The provision for taxation is there for all to heed as an incident to incorporation for business ventures. As stated in *Higgins* v. *Smith*, *supra* (p. 477):

> A taxpayer is free to adopt such organization for his affairs as he may choose and having elected to do some business as a corporation he must accept the tax disadvantages.[11]

To similar effect see *Gray* v. *Powell*, 314 U. S. 402, 414. Cf. *Edwards* v. *Chile Copper Co.*, 270 U. S. 452, 456.

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[11] For Circuit Court decisions applying this principle announced in *Higgins* v. *Smith*, *supra*, see *Esmond Mills* v. *Commissioner*, 132 F. 2d 753 (C. C. A. 1st); *Palcar Real Estate Co.* v. *Commissioner*, 131 F. 2d 210 (C. C. A. 8th); *Vim Securities Corp.* v. *Commissioner*, 130 F. 2d 106 (C. C. A. 2d), certiorari denied, December 7, 1942, No. 508, present Term; *Texas-Empire Pipe Line Co.* v. *Commissioner*, 127 F. 2d 220 (C. C. A. 10th); *Salmon* v. *Commissioner*, 126 F. 2d 203 (C. C. A. 2d); *Watson* v. *Commissioner*, 124 F. 2d 437 (C. C. A. 2d).

The construction contended for eases the task of administration and, from the taxpayer's viewpoint, eliminates the hazard of uncertainty in business affairs and the expense of litigation. Altogether the wisdom of Congress in taxing the income of every corporation and the essential fairness of so doing is clearly apparent.

Under this construction of Section 13 the only question remaining is whether the income in question was that of the taxpayer. Petitioner's brief is largely directed to this issue and it earnestly contends that the taxpayer acted as a mere agent or fiduciary for its stockholder so that the income in question was not its income at all.[12] The issue raised is clearly one of law for the facts respecting the taxpayer's relation with Thompson are not in dispute. The only question is whether as a legal matter, on the basis of that relation, the taxpayer is taxable on the gain from the sale by it of the property to which it held title as owner or whether, as the Board of Tax Appeals held, the taxpayer should be disregarded to effect "a more realistic assessment of taxes." (R. 21.) This was no more than a legal conclusion that the taxpayer's inactivity and its identity of interest with Thompson exempted it from the tax levied by Section 13.

That a corporation may act as an agent for its

[12] The agency argument is not predicated upon any contractual relationship with Thompson. If he had sold his stock, the claimed agency relationship would then have been with the purchaser.

sole stockholder if the transaction is cast in that mold may be conceded. In such a case the benefits and the burdens of principalship remain with the stockholder. Here, however, it cannot be contended that the taxpayer was designated by Thompson to act as his agent or that the taxpayer purported to act as agent, trustee, or mere conduit in any of the income-producing transactions. On the contrary, the undisputed facts make clear that the beneficial interest of Thompson in the property sold had been designedly relegated to that of a stockholder and that there is no basis for any "agency" argument.

Title to realty in Block 77 in 1928 was in Thompson and he was about to lose the property for delinquent taxes. The property was mortgaged to one bank and its affiliate proposed to lend the money to pay the back taxes if a corporation was formed to hold title to the property and Thompson pledged all its stock as collateral for the loan. To this Thompson agreed, and in accordance with his decision the taxpayer was created for this obviously proper business purpose. Title to Block 77 was conveyed to the taxpayer and the taxpayer's stock was pledged to the bank. It was of the essence of the plan that the corporation succeed Thompson as the owner of the land.[13] To categorize the taxpayer as a

[13] Thompson owned other real property in his own name (R. 19) and the segregation of Block 77 in the Moline corporation insulated that property from Thompson's general creditors.

"dummy" or a "figmentary agent" and identify it with Thompson would conflict directly with the reason for its creation. Cf. *Sheldon Bldg. Corp.* v. *Commissioner,* 118 F. 2d 835, 837 (C. C. A. 7th).

When the taxpayer was first organized, Thompson had no control over it (cf. *New Colonial Co.* v. *Helvering, supra,* p. 441), and even after the voting trust agreement was terminated in 1933 he was simply in the position of a person taking over the stock of a corporation already organized and functioning. After the settlement of the $6,750 loan from Biscayne and the payment of the two mortgages in 1933 the taxpayer continued its corporate existence. (R. 18–19.) In 1934 it received income from renting a portion of its property (R. 19). Some time prior to termination of the creditor control of the taxpayer an action was instituted to remove certain restrictions imposed on Block 77 by a prior deed and this action did not terminate until 1936 (R. 18, 41, 54). The taxpayer was also involved in a condemnation proceeding during this period (R. 18). The property owned by the corporation was sold in three parcels, one in 1934, one in 1935, and one in 1936 (R. 19). Some of the proceeds from the sale of property in 1936 were used to pay the loan authorized by the taxpayer and secured by a mortgage on its property, as well as accumulated taxes against the property (R. 18, 41). Finally,

it may be noted, the sales made in 1934 [14] and 1935 were reported by the taxpayer on its returns (R. 19).

In the face of these facts it is clear that the taxpayer was a real corporation for the tax years in question, serving a business purpose, and one doing business in its own right. That the taxpayer kept no accounts, that it may have subserved directly the interest of its sole stockholder on occasion, and that he on some occasions may have disregarded the legal separation of his corporate from his natural self,[15] is not remarkable in light of the fact that the taxpayer was a wholly-owned corporation. The gains and losses for the tax years involved resulted from the sale by the taxpayer of lands owned by it. The income therefrom was therefore that of the taxpayer. Had Thompson desired the taxpayer to act as his agent and be so regarded by the world, such elaborate

[14] The 1934 sale resulted in a loss and it was not advantageous to shift it to Thompson's individual return, since his deduction would have been limited by Section 117 (a) and (d) of the Revenue Act of 1934. Only the years 1935 and 1936 are involved here.

[15] In fact, there was considerable respect for the corporate entity on the part of those dealing with it. With respect to the 1936 sale, the purchaser refused to make the check for the purchase price payable to anyone but the taxpayer. Thompson, as president of the taxpayer, endorsed the check. He offered it for deposit in his account but the bank refused to accept it until Thompson furnished a corporate resolution consenting to that being done. (R. 50–51.) Moreover, as seen above, a substantial number of transactions took place where the taxpayer appeared as principal.

precaution should not have been taken to relegate his interest in the property sold to that of stockholder rather than principal.

The argument that a corporation that has performed the functions of the taxpayer can disavow its responsibility for tax purposes when business has been done in the corporate name, clearly would preclude, as a practical matter, the construction of Section 13 contended for above. If corporate responsibility can be disclaimed for tax purposes on an agency theory where the corporation has acted as principal, then the tax levied by Section 13 is not the price of doing business as a corporation. In most one-man corporations quite as strong an agency argument can be made as is advanced here. Its acceptance would mean in net result the exemption of a large class of corporations from the tax levied by Section 13, and that Congress did not intend.

Actually, the contention that a corporation that has acted as principal is a mere conduit or agent for its stockholder is but another way of articulating the contention that a wholly-owned corporation engaging in little activity should not be recognized as a legally responsible entity, i. e., that the corporate entity should be disregarded. Respecting the corporate entity in the case of a wholly-owned corporation means, of course, that the corporation is recognized as the legally responsible entity as distinguished from its stock-

holder. Hence, respecting the entity and treating the corporation as a mere figmentary agent for the stockholder are irreconcilable opposites. However the argument here is phrased the issue is the same. Do the facts that the corporation has but one stockholder, that it represents his business interests in its transactions, and that on occasion he may naturally intermingle his individual and corporate activities, compel the conclusion that Congress did not intend the tax levied by Section 13 to apply to such a corporation with respect to business done in its name as principal?

If, as contended, Section 13 is to be construed as imposing a tax on the use of the corporate device, the answer is clear.

The agency argument was addressed to this Court and rejected in *Burnet* v. *Commonwealth Imp. Co., supra.* There the wholly-owned corporation merely held securities formerly owned by its sole stockholder for the dual purpose of avoiding multiple death duties or transfer taxes and to safeguard an endowment which its owner wished to make to a favorite charity. The corporation's only activity, referred to in the opinion, apart from holding title to these securities, was to purchase some stock by virtue of stock rights it had and to sell stock held by it to its stockholder. This Court held that it was taxable on the gain realized on the sale of this stock to its only stockholder. In rejecting the

contention that the corporate entity should be disregarded *or* that the taxpayer should be regarded as "merely the agency or the instrumentality" of the stockholder, this Court observed (pp. 419–420):

> Certainly, the Improvement Company and the Estate were separate and distinct entities; the former was avowedly utilized to bring about a change in ownership beneficial to the latter. For years they were recognized and treated as different things and taxed accordingly upon separate returns. The situation is not materially different from the not infrequent one where a corporation is controlled by a single stockholder. * * *.

This decision, in light of the contention there made, is a clear recognition that the entity and agency arguments in such a case as this are one and the same. The later expression in *Higgins* v. *Smith, supra,* represents further recognition that it is not the Commissioner's task to examine minutely corporate-stockholder relations in applying Section 13.

For the same reason that the taxpayer is subject to Section 13, it is taxable on the income from the sale of its property, i. e., the transactions were carried out as corporate business and the tax consequence of so clothing the transactions

must be accepted. Nor is the rule one-sided, for it was for Thompson to decide, in the first instance, whether the advantages and disadvantages of incorporation should be assumed.

The decisions relied on by the taxpayer as establishing the rule that a corporation that functioned as it did must be regarded as a mere agent cannot be regarded as authoritative. The cited cases do not establish any distinction between the "agency" doctrine and outright disregard of the corporate entity. As seen above, such a distinction is mere verbalism. However phrased, the issue is whether the corporation is to be treated as a taxpayer and taxed on the income from its transactions.

The decisions of the Board of Tax Appeals cited as establishing an independent rule of law with reference to the tax status of corporations in fact involve many different types of situations. Some of the Board's decisions holding a corporation nontaxable on income from the sale of property to which it held title have been based on the fact that the conveyance to the corporation in the first instance was one of several contemporaneous documents that established that the corporation took title only as agent or trustee. In such a case it may be observed that the beneficial owners forswear many of the advantages of having their

business done as corporate business.[16] That was not the case here. Another decision of the Board was based on the assumption that local law determines whether a corporation is taxable on sales made of its property.[17] Other Board decisions cited rest on the erroneous construction of this Court's decision in *Southern Pacific Co.* v. *Lowe*, *supra*, contended for by the taxpayer here.[18]

The later Board decisions holding corporations nontaxable have relied principally on the Circuit Court decisions in *112 West 59th Street Corp.* v. *Helvering*, 68 F. 2d 397 (App. D. C.), and *North Jersey Title Ins. Co.* v. *Commissioner*, 84 F. 2d 898 (C. C. A. 3d), also cited by the taxpayer. The first of these cases reversed a decision of the Board of Tax Appeals and held a corporation nontaxable on income from the sale of property to which it had held title for upwards of two years, as an aid to conveyance on sale during the absence of an interested party. The decision was based on the ground that the beneficial interest

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[16] See *Forshay* v. *Commissioner*, 20 B. T. A. 537; *Moro Realty Holding Corp.* v. *Commissioner*, 25 B. T. A. 1135.

[17] *Thrift Realty Co.* v. *Commissioner*, 29 B. T. A. 545. It may be noted that *McInerney* v. *Commissioner*, 29 B. T. A. 1, affirmed, 82 F. 2d 665 (C. C. A. 6th), involved disregard of the corporate entity at the Commissioner's behest; hence it is not relevant here.

[18] In this connection see *Mayer* v. *Commissioner*, 36 B. T. A. 117, and *Abrams Sons' Realty Corp.* v. *Commissioner*, 40 B. T. A. 653.

in the property was in the stockholders and some emphasis was placed on local law in arriving at this result.

In *North Jersey Title Ins. Co.* v. *Commissioner, supra,* a corporation organized by an insurance company to manage and salvage as much as possible from certain property for the insurance company was held not to constitute a taxable entity, reversing the decision of the Board. The basis for the Circuit Court decision was the same misconstruction of *Southern Pacific Co.* v. *Lowe, supra,* urged here by the taxpayer and analyzed above.

Many of the decisions of the Board cited by the taxpayer are distinguishable on their facts from the case here presented. In so far as relavant they, together with the two Circuit Court decisions referred to above, assert on the basis of local property law or a misconstruction of this Court's decision in *Southern Pacific Co.* v. *Lowe* that the taxability of a corporation on income from sale of its property depends on the amount of corporate activity and ownership of the corporate stock. These cases in principle, therefore, conflict with this Court's decisions in *Burnet* v. *Commonwealth Imp. Co., supra,* and *Higgins* v. *Smith, supra,* as well as the expressed will of Congress as explained above.

The other decision relied on by the taxpayer is that of *United States* v. *Brager Building & Land*

Corp., 124 F. 2d 349 (C. C. A. 4th). There certain property was under a long-term lease in which the owners, a partnership, had provided that the rentals should be paid by the lessee directly to a trustee for payment of a debt secured by a mortgage on the property. Subsequently the property was conveyed to a corporation and a tax was assessed against it on the basis of the rental payments described. The Circuit Court held that under these circumstances, where the corporation did no more than hold title to realty, the corporation was not taxable on the rental income. Clearly the case is distinguishable from that here presented. Indeed, it appears that the court that decided it would not follow it here, see *American Package Corp.* v. *Commissioner*, 125 F. 2d 413, 415 (C. C. A. 4th). In so far, however, as the decision in *United States* v. *Brager Building & Land Corp., supra,* is based on the proposition that a corporation is not taxable on income from property held by it, when there is nothing more than the ownership of stock and corporate inactivity to support an "agency," the doctrine announced cannot be accepted. Such a rule of law is not compatible with the proposition that one of the prices of corporate existence is payment of the tax levied by Section 13.

In contrast with the decisions relied on by the taxpayer, reference may be made to the decisions

in *Palcar Real Estate Co.* v. *Commissioner*, 131 F. 2d 210 (C. C. A. 8th), and *Sheldon Bldg. Corp.* v. *Commissioner*, 118 F. 2d 835 (C. C. A. 7th), where on comparable facts the corporations were held to be taxpayers rather than ephemeral agents.

Even if it be assumed that there is a species of corporations of such low estate as to be exempt from taxation under Section 13, it seems clear that the taxpayer does not fall in that group. It is often stated that as a general rule a corporation and its stockholders are separate entities for taxation as well as other purposes. *Klein* v. *Board of Supervisors*, 282 U. S. 19; *Dalton* v. *Bowers*, *supra*; *Burnet* v. *Clark*, *supra*; *New Colonial Co.* v. *Helvering*, *supra*; *Burnet* v. *Commonwealth Imp. Co.*, *supra*. Whatever the scope of any exception to the general rule for purposes of Section 13, it most certainly does not embrace corporations formed for recognized business purposes that proceed to fulfill their functions.[19] *Burnet* v. *Commonwealth Imp. Co.*, *supra*; *Higgins* v. *Smith*, *supra*.

From the facts as developed hereinbefore it is clear that the taxpayer was formed for a business

[19] See Finkelstein, *The Corporate Entity and the Income Tax* (1935), 44 Yale L. J. 436, 452, *et seq.*; Harrar, *The Function of the Entity in Federal Income Taxation: Recent Developments* (1940), 25 Minn. L. Rev. 189, 194; Ballantine, *Corporate Personality in Income Taxation* (1921), 34 Harv. L. Rev. 573.

purpose and fulfilled business functions. It is therefore clearly taxable on the income resulting from the sale of its property.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 660.—October Term, 1942.

Moline Properties, Inc., Petitioner, vs. Commissioner of Internal Revenue. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[June 1, 1943.]

Mr. Justice Reed delivered the opinion of the Court.

Petitioner seeks to have the gain on sales of its real property treated as the gain of its sole stockholder and its corporate existence ignored as merely fictitious. Certiorari was granted because of the volume of similar litigation in the lower courts and because of alleged conflict of the decision below with other circuit court decisions.[1] — U. S. —.

Petitioner was organized by Ely O. Thompson in 1928 to be used as a security device in connection with certain Florida realty owned by him. The mortgagee of the property suggested the arrangement, under which Mr. Thompson conveyed the property to petitioner, which assumed the outstanding mortgages on the property, receiving in return all but the qualifying shares of stock, which he in turn transferred to a voting trustee appointed by the creditor. The stock was to be held as security for an additional loan to Mr. Thompson to be used to pay back taxes on the property. Thompson owned other real property, title to which he held individually. In 1933 the loan which occasioned the creation of petitioner was repaid and the mortgages were refinanced with a different mortgagee; control of petitioner reverted to Mr. Thompson. The new mortgage debt was paid in 1936 by means of a sale of a portion of the property held by petitioner. The remaining holdings of the petitioner were sold in three par-

[1] 112 West 59th Street Corp. v. Helvering, 68 F. 2d 397; United States v. Roger Building & Land Corp., 124 F. 2d 349; North Jersey Title Ins. Co. v. Commissioner, 84 F. 2d 898; Inland Development Co. v. Commissioner, 120 F. 2d 986; see The Carling Holding Co. v. Commissioner, 41 B. T. A. 493; Mayer v. Commissioner, 36 B. T. A. 117; Abrams Sons' Realty Corp. v. Commissioner, 40 B. T. A. 653; Thrift Realty Co. v. Commissioner, 29 B. T. A. 345; Moro Realty Holding Corp. v. Commissioner, 25 B. T. A. 1135, affirmed 67 F. 2d 1013; Forshay v. Commissioner, 20 B. T. A. 537.

cels, one each in 1934, 1935 and 1936, the proceeds being received by Mr. Thompson and deposited in his bank account.

Until 1933 the business done by the corporation consisted of the assumption of a certain obligation of Thompson to the original creditor, the defense of certain condemnation proceedings and the institution of a suit to remove restrictions imposed on the property by a prior deed. The expenses of this suit were paid by Thompson. In 1934 a portion of the property was leased for use as a parking lot for a rental of $1,000. Petitioner has transacted no business since the sale of its last holdings in 1936 but has not been dissolved. It kept no books and maintained no bank account during its existence and owned no other assets than as described. The sales made in 1934 and 1935 were reported in petitioner's income tax returns, a small loss being reported for the earlier year and a gain of over $5,000 being reported for 1935. Subsequently, on advice of his auditor, Thompson filed a claim for refund on petitioner's behalf for 1935 and sought to report the 1935 gain as his individual return. He reported the gain on the 1936 sale.

The question is whether the gain realized on the 1935 and 1936 sales shall be treated as income taxable to petitioner, as the Government urges, or as Thompson's income. The Board of Tax Appeals held for petitioner on the ground that because of its limited purpose, the corporation "was a mere figmentary agent which should be disregarded in the assessment of taxes." *Moline Properties, Inc.* v. *Commissioner*, 45 B. T. A. 647. The Circuit Court of Appeals reversed on the ground that the corporate entity, chosen by Thompson for reasons sufficient to him, must now be recognized in the taxation of the income of the corporation. *Commissioner* v. *Moline Properties, Inc.*, 131 F. 2d 688.

The doctrine of corporate entity fills a useful purpose in business life. Whether the purpose be to gain an advantage under a law of the state of incorporation[2] or to avoid[3] or to comply with the demands of creditors or to serve the creator's personal or undisclosed convenience,[4] so long as that purpose is the equivalent

[2] Texas Empire Pipe Line Co. v. Commissioner, 127 F. 2d 229. Cf. Edwards v. Chile Copper Co., 270 U. S. 452, 453-4, 456.

[3] Sheldon Bldg. Corp. v. Commissioner, 118 F. 2d 835.

[4] Polear Real Estate Co. v. Commissioner, 131 F. 2d 216.

[5] Watson v. Commissioner, 124 F. 2d 437; Salmon v. Commissioner, 126 F. 2d 203.

business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity. *New Colonial Co.* v. *Helvering*, 292 U. S. 435, 442; *Deputy* v. *du Pont*, 308 U. S. 488, 494. In *Burnet* v. *Commonwealth Imp. Co.*, 287 U. S. 415, this Court appraised the relation between a corporation and its sole stockholder and held taxable to the corporation a profit on a sale to its stockholder. This was because the taxpayer had adopted the corporate form for purposes of his own. The choice of the advantages of incorporation to do business, it was held, required the acceptance of the tax disadvantages.

To this rule there are recognized exceptions. *Southern Pacific Co.* v. *Lowe*, 247 U. S. 330, and *Gulf Oil Corp.* v. *Lewellyn*, 248 U. S. 71, have been recognized as such exceptions but held to lay down no rule for tax purposes. *New Colonial Co.* v. *Helvering*, *supra*, 442, n. 5; *Burnet* v. *Commonwealth Imp. Co.*, *supra*, 419, 420. A particular legislative purpose, such as the development of the merchant marine whatever the corporate device for ownership, may call for the disregarding of the separate entity. *Missouri S. S. Line* v. *Commissioner*, 77 F. 2d 849, as may the necessity of striking down frauds on the tax statute. *Continental Oil Co.* v. *Jones*, 113 F. 2d 557. In general, in matters relating to the revenue, the corporate form may be disregarded where it is a fraud or mistake. In such situations the form is a bald and meaningless fiction. *Higgins* v. *Smith*, 308 U. S. 473, 477-78; *Griffiths* v. *Helvering*, 308 U. S. 355.

The petitioner corporation was created by Thompson for his advantage and had a special function from its inception. At that time it was clearly not Thompson's *alter ego* and his exercise of control over it was negligible. It was then as much a separate entity as if its stock had been transferred outright to third persons. The argument is made by petitioner that the force of the rule requiring its separate treatment is avoided by the fact that Thompson was coerced into creating petitioner and was completely subservient to the creditors. But this merely serves to emphasize petitioner's separate existence. *New Colonial Co.* v. *Helvering*, *supra*, 441. Business necessity, i. e., pressure from creditors, made petitioner's creation advantageous to Thompson.

When petitioner discharged its mortgages held by the initial creditor and Thompson came into control in 1933, it was not dissolved, but continued its existence, ready again to serve his business interests. It again mortgaged its property, discharged that

new mortgage, sold portions of its property in 1934 and 1935 and filed income tax returns showing these transactions. In 1934 petitioner engaged in an unambiguous business venture of its own—it leased a part of its property as a parking lot, receiving a substantial rental. The facts, it seems to us, compel the conclusion that the taxpayer had a tax identity distinct from its stockholder.

Petitioner advances what we think is basically the same argument of identity in a different form. It urges that it is a mere agent for its sole stockholder and "therefore the same tax consequences follow as in the case of any corporate agent or fiduciary." There was no actual contract of agency, nor the usual incidents of an agency relationship. Surely the mere fact of the existence of a corporation with one or several stockholders, regardless of the corporation's business activities, does not make the corporation the agent of its stockholders. Therefore the question of agency or not depends upon the same legal issues as does the question of identity previously discussed. *Burnet* v. *Commonwealth Imp. Co.*, *supra*, 418, 419-20.

Affirmed.